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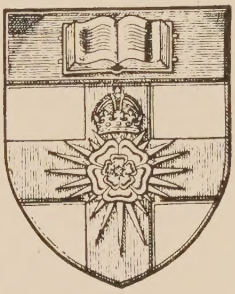

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THE

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THE

LAW REPORTS.

529N

Under the Superintendence and Control of the
INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

Probate Division.

CASES DETERMINED IN THE

COURTS OF PROBATE AND DIVORCE,

IN THE

ADMIRALTY AND ECCLESIASTICAL COURTS,

AND ON APPEAL THEREFROM IN THE

PRIVY COUNCIL,

AND IN THE

COURT OF APPEAL.

EDITOR—J. R. BULWER, Q.C.

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VOL. VIII.

1883,—XLVI AND XLVII VICTORIÆ.

LONDON:
Printed and Published for the Council of Law Reporting
BY WILLIAM CLOWES AND SONS, LIMITED,
DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.
PUBLISHING OFFICE, 27, FLEET STREET, E.C.

1883.

BIBL. LONDIN UNIV.

JUDGES

OF

THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION

OF

THE HIGH COURT OF JUSTICE.

XLVI AND XLVII VICTORIÆ.

The Right Hon. Sir JAMES HANNEN, Knt., President.

The Hon. Sir CHARLES PARKER BUTT, Knt.

JUDGES

OF

THE COURT OF APPEAL.

XLVI AND XLVII VICTORIÆ.

Lord SELBORNE, Lord Chancellor.

The Right Hon. JOHN DUKE, Lord COLERIDGE, Lord Chief Justice of England.

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Sir HENRY COTTON,
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Sir EDWARD FRY,

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The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1884, will be as follows :—

In the First Series,
25 Ch. D.

In the Second Series,
12 Q. B. D. 9 P. D.

In the Third Series,
9 App. Cas.

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eight years. It is now complete. It falls upon me to announce to your Majesty that it is ready to be constituted as 'the certain place' in which, in accordance with the ancient laws of your kingdom, justice shall be administered in the future by your Majesty's Courts."

Her Majesty, having accepted the key, delivered it to the keeping of the Lord Chancellor, and spoke as follows:—

"My Lord Chancellor:—

"I deliver into your charge with this key the care of these Courts of Law. I trust that the uniting together in one place of the various branches of Judicature in this my Supreme Court will conduce to the more efficient and speedy administration of justice to my subjects, and I have all confidence that the independence and learning of the Judges, supported by the integrity and ability of the other members of the profession of the law, will prove in the future, as they have been in times past, a chief security for the rights of my Crown and the liberties of my people."

The Lord Chancellor received the key and, on behalf of himself and the Judges of England, thus addressed Her Majesty:—

"May it please your Majesty:—

"In the name and on behalf of the assembled Judges of your Majesty's Supreme Court of Judicature, I accept the charge which your Majesty has been pleased to lay upon me; and I ask permission to offer to your Majesty the humble expression of our loyal devotion to your Majesty's person and throne, and of our gratitude for the part which your Majesty has been graciously pleased to take in the solemnity of this day. This building, now complete, was authorized by your Majesty with the concurrence of Parliament, in the year 1865, and it has been in progress for more than eight years, under the hands of a great architect, to whom it has not been permitted to see this day. Your Majesty, whose strength of sympathy is so well known to us all, will, I am sure, share the feelings of your subjects when they think of those who are no longer with us—of the architect whom we have lost,

and of that good prelate, venerable as much for his wisdom and virtue as for his great office, from whose lips we might have hoped, not many months since, to hear the Divine blessing invoked upon us to-day. Man passes away, but his works remain. This building, we trust, will remain to a remote posterity, one of the most magnificent public works of the time in which we live. These Royal Courts of Justice, stately enough to satisfy even those who are most accustomed to Westminster Hall, will not, like Westminster Hall, recall the memories of Norman or Plantagenet, of Tudor or Stuart kings; but they will be for ever associated with the name of your Majesty, and with the glories of a reign happy, beyond all which have preceded it, in those qualities of the Sovereign which have caused your Majesty to be so universally beloved and revered, in the advancement of all the arts of civilization, and in the general peace and prosperity of the British people. Among the legislative improvements which have distinguished your Majesty's reign, not the least has been the consolidation and union of the several branches of the Supreme Judicature, which formerly exercised divided jurisdiction. To give full effect to that great change, it was necessary that the different Courts and offices should be brought together in one edifice, fit for the duties which they have to perform. This has at last been done; and your Majesty, by your gracious presence here to-day, has given a signal proof of your care for that justice which will here be administered in your name. It was, indeed, fitting, and worthy of your Majesty, that these Royal Courts should be dedicated to their future use by the Sovereign of these realms, whose noblest prerogatives are justice and mercy, and from whom all jurisdiction within the British dominions is derived. Your Majesty's Judges are deeply sensible of their own many shortcomings, and of their need of that assistance which they have constantly received from the Bar of England, and from the other members of the legal profession; but, encouraged by your Majesty's gracious approval, and having before them the examples of a long line of illustrious predecessors, they have endeavoured, and will always endeavour, to fulfil the great duties entrusted to them with fidelity to your Majesty, with zeal for the public service, with firmness, impartiality, and integrity, in the fear of God, and without fear

of man. That they, and their successors, may be enabled truly to do justice within these walls, as long as the British name shall endure; that the blessing of the Almighty may rest upon their labours; that the law which they administer may ever be a terror to evil-doers, and a strength and support to those who have right on their side; and that your Majesty may be preserved for many future years, still to shed fresh lustre upon a throne founded on law, sustained by justice, and established in the hearts of your Majesty's people, is the fervent prayer of all the Judges of your Majesty's Supreme Court of Judicature, for whom on this august occasion it has been my privilege to address your Majesty."

The Archbishop of York offered up a prayer.

The Queen then declared the building open.

Her Majesty's State Trumpeters, stationed at the north end of the Hall, announced the event by a flourish of trumpets.

The Attorney-General, on behalf of the Bar of England, humbly prayed Her Majesty to direct that the proceedings should be entered upon the records of the Supreme Court.

The Queen, through The Lord Chancellor, signified her royal consent that "it should be done as prayed."

Addresses were then presented to Her Majesty by His Royal Highness the Prince of Wales, accompanied by the four Treasurers, on behalf of the Inns of Court; and by the Lord Chancellor, accompanied by the President of the Incorporated Law Society, on behalf of that society, and the proceedings terminated.

CASES

DETERMINED BY THE

PROBATE DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS

XLVI VICTORIÆ.

[IN THE COURT OF APPEAL.]

1882
Nov. 27.

THE R. L. ALSTON.

Damage—Construction of Tees Conservancy Regulations—"Maximum Speed of Six Miles per Hour."

The 22nd clause of the bye-laws of the river Tees, which provides that no steamship shall be navigated on any part of the river Tees at a higher rate of speed than six miles per hour, is to be construed as prohibiting a steamship proceeding against the tide being navigated at a greater speed than six miles per hour over the ground.

Decision of the Admiralty Division (7 P. D. 49) reversed.

APPEAL by the plaintiffs from the judgment of Sir Robert Phillimore.

This was an action of damage instituted on behalf of the owners of the steamship *Lady Mostyn*, and the owners of her cargo against the steamship *R. L. Alston* to recover for the damage arising out of a collision between the two vessels in the

5-17

1882

THE R. L. ALSTON.

river Tees. The facts are sufficiently stated in the report of the proceedings before the Admiralty Division (1), and in the judgments hereinafter set forth.

Nov. 25, 27. *Butt, Q.C.*, and *Cohen, Q.C.*, for the plaintiffs.

R. E. Webster, Q.C., and *W. G. F. Phillimore*, for the defendants.

BAGGALLAY, L.J. About 2 o'clock in the morning of the 6th of November last year, a collision took place in the river Tees between two steam vessels, the *Lady Mostyn* and the *R. L. Alston*. There is a bye-law or rule regulating the navigation of steam vessels in the river Tees, and that bye-law fixes the maximum of speed at which steam vessels navigating the Tees may proceed. The rule is in these terms: "No steamship shall at any time be navigated in any part of the river at a higher rate of speed than a maximum rate of six miles per hour." Shortly before the collision, the *Lady Mostyn* was proceeding down the river with a speed of five knots over the ground, having at the time, the tide against her, the rate of the tide being assumed for the purpose of the argument, as three knots an hour. Consequently the *Lady Mostyn* in order to proceed five knots over the ground must have been proceeding at the rate of eight knots through the water. If the rate of speed referred to in rule 22 means the rate of going through the water, she was exceeding the maximum which the rule allowed her to adopt; if, on the other hand, the true meaning of the rate of speed in the rule was the rate of going over the ground, she was within the limit. The learned judge in the Admiralty Court has come to the conclusion that the true construction to be put on the rule was, that the rate of speed was to be regulated by the going through the water, and not by the going over the ground, and from that decision the present appeal is brought, and it is the only question which we have to consider on the present appeal.

We must, first of all, have regard to what must be supposed to have been the object of the framers of this bye-law, which is made under an Act of Parliament. I think there can be no

(1) 7 P. D. 49.

question that it was made for the purpose of protecting and guarding, as far as might be possible, against collisions in the river. It may perhaps be suggested that it was framed also with a view of protecting the banks of the river, which might be injured by a high rate of speed, but I think the more important object would be that of preventing collisions. Collisions may be of several kinds. There may be a collision between two steam vessels proceeding in opposite directions; there may be a collision arising from a steam vessel proceeding at a certain speed, and coming in contact with some fixed object, as for instance, a vessel at anchor; or there may be a collision between a steam vessel going at a certain rate of speed and some other vessel, not a steam vessel perhaps, crossing the course, or otherwise moving about at a greater or less rate of speed in the current of the stream; and we must consider that this rule is intended to be applicable to each and every of the several kinds of collisions which may occur. It appears to me that directly we attempt to test the meaning of the words "rate of speed" by considering how they would operate and bear on the case of a collision between a steam vessel in motion and an object at rest, or slightly moving, the construction contended for by the appellants has every element of being the right construction. If the rule is to be the rate of going through the water and not the rate of going over the ground, a vessel having the tide in her favour and approaching an object at rest, or only slightly moving, would be at liberty to go at the full extent of the six miles over the ground, together with whatever the rate of the tide might be at the time, bringing the speed up in the case assumed to nine knots an hour. Therefore, one hardly requires to have the position more than stated, to say that one can hardly suppose that it was the intention of the framers of that regulation that if there was a three knot tide running, the vessel which was coming with the tide in her favour might go at the rate of nine knots an hour, whereas the one which was coming with the tide adverse to her should only go at the rate of three knots an hour. That seems to me an unreasonable construction. Whereas the construction contended for by the appellants, which is the rate over the ground, would allow each one to approach at the rate of six miles an hour; and the risk of collision is propor-

1882

THE R. L. ALSTON.

Baggallay, L.J.

tionate to the rate at which the vessels are, if both are in motion, approaching each other, or if one is at rest and the other in motion, the rate at which the one in motion is approaching the fixed object. I confess it appears to me that it is sufficient to suggest what would be the proper interpretation to put upon the rule. If the other interpretation were put upon it, it seems to me that it would lead to an irrational conclusion. But it has been suggested, and the argument was put prominently forward by the counsel for the respondents, that the very object of this rule was that there should be something in it by which the party navigating the vessel should know for certain what he ought to do. I ventured to suggest in the course of the argument that whoever had charge of the navigation, must know at what rate his vessel was moving through the water substantially. If he is in any doubt as far as regards the actual rate of the tide, a small diminution from the maximum rate of speed allowed would be sufficient to enable him to proceed with reasonable certainty. At the same time, I cannot help thinking that the greater part of those navigating the river Tees must know at what rate of speed the tide is moving at a particular time when they are going up or coming down the stream, and although there may be some exceptional circumstances causing at a particular time some little variation, that is a matter that could be guarded against. The argument of the counsel for the respondents was that, although a man can approximately tell at what rate the vessel is going through the water, he cannot always tell at what rate she is going over the ground. If he cannot so accurately ascertain it, it seems to me that by a little care and a little keeping within the maximum amount he might always be on the safe side; but what the counsel for the appellants have said, is a strong illustration that it is not so difficult to ascertain at what rate the ship is going over the ground, because, in the rules for the navigation of the river Thames, the rate of speed is there to be regulated in accordance with the rate of speed of going over the ground. It is, therefore, not so difficult to ascertain with any reasonable degree of certainty what is the rate of speed over the ground. I quite agree with the observation that the rules of one particular river can hardly be construed

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by the rules which are applicable to some other river, but it certainly appears to me to afford an answer to an argument, such as that put by the counsel for the respondents, as to the rate being uncertain at which the vessel is going over the ground. I think that although the object of the framers of the rules might have been to some extent for the protection of the banks of the river, what has been said with regard to the risk of collision appears to me a strong reason for the rule to be construed to mean the rate of speed over the ground rather than the rate of speed through the water, although the rate of speed might affect the banks of the river by reason of the wash. For these reasons I think that the construction which the learned judge has put upon the rule is not that which the words properly bear, and that this appeal should be allowed.

BRETT, L.J. In this case the vessel *Lady Mostyn* is found to be partly to blame, not on the ground of the speed at which she was approaching another vessel with regard to the two vessels themselves, but simply on the ground that she has committed a breach of one of the bye-laws of the Tees Navigation; and the question is raised, whether the construction which has been put upon one of these rules by the learned judge of the Admiralty Court, is that which ought to be adopted. That is the only question which is before us. I think it must be obvious to anybody who reads this rule that it is capable of either construction. It is unfortunately expressed in such language that it leaves it quite as much open with regard to its form of expression to the one interpretation as to the other. What, then, is to be done? We must try and get at the meaning of what was intended by considering the consequences of either construction. The rules are made for the navigation of a river which would be crowded with vessels, and of a river with banks in sight, and we must consider which is the more reasonable construction.

Now it is undoubted, as my learned Brother has pointed out, that there are three kinds of collision. With regard to a steamboat she may be in danger of coming into collision with an approaching steamer; she may be in danger of coming into collision with a vessel at anchor; she may be in danger of

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coming in collision with a sailing vessel which is tacking across, and which, therefore, in a narrow river and for the purposes of this rule would be in much the same position as a stationary object. With regard to the danger of collision there are always two matters to be considered as to the conduct of the vessels. One is as to her course and the other is as to her speed. There are rules for avoiding danger of collision in regard to both these considerations. There are always rules with regard to the course, that is to say, when a vessel is approaching another vessel she has to steer in a particular way. That is for the purpose of avoiding danger of collision with respect to her course. There are always other rules as regards the rate of speed, that is, her facility for stopping in time to avoid a collision. This rule has nothing to do with steering. There are other rules, no doubt, with regard to steering. Rule 22 and the next one to it are concerned only with that part of the navigation of the steamship which relates to her power to stop herself when there is danger of collision. I think we have exhausted almost every possible mode of viewing this case. The one which governs my decision certainly is this, that the rule is laid down with regard to the navigation of steamers in a crowded river with visible banks. I know that during the night the banks may not be seen; but these rules are made for the day as well as for the night, and probably are made for the day rather than for the night, because there is, I suppose, much more navigation in the day-time than in the night-time. On the construction of the rule—and this is what has most governed me—it must be obvious that a vessel going against a strong tide has a much greater facility than one which is going with the tide, because however fast a vessel may be going through the water when she is going against the tide, the moment she tries to stop herself she has to assist her in stopping the force of the tide which is coming down upon her, whereas in the case of the vessel which is going with the tide the moment she tries to stop herself she has the force of the tide still carrying her on, and in order to stop herself really she must not only take off from herself the speed of which she herself is the cause, but she must so stop herself as to act against the force of the tide which is still carrying her on. It is said that if the two vessels are approaching

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each other end on, the one against the tide and the other with it, that is not a matter to take into consideration. I very much doubt that; but it is most undoubted that it is very material when a vessel is approaching another vessel at anchor, or a vessel coming across the tide, which is very much the same as if she was stationary. It is impossible to understand that anybody drawing these rules with regard to the navigation of steamers in a crowded and somewhat narrow river should be supposed to admit for a moment, that a steamer should be approaching any fixed object, or even any moving object, at the rate of ten miles an hour. That seems to me to be monstrous, and could not have been intended. That seems to me to be the real consideration which governs this matter. No doubt we have had difficulties about this interpretation. The great difficulty put to us was the difficulty of judging of the rate of speed, and it was said that if a vessel is in motion her rate of speed can only be judged by the rate at which she is going through the water. But when a vessel is in the ocean it is very much as if those on board were in a carriage driving across Salisbury Plain without a mark on it, when no doubt it would be very difficult to tell at what rate the carriage is going; but when a carriage is going along a road marked with milestones, it is easy to tell at what rate the carriage is going by marking one milestone and seeing how long it is before reaching another. The points in a river with banks are very much more like a road marked with milestones than like Salisbury Plain, because there are marks and steeples, and other things which everybody navigating the river knows perfectly well, and by which he can judge of the rate of speed at which the vessel is going over the ground. He can judge by seeing how long the vessel is in going from one known mark to another known mark on the bank. An expression used before us, which is one of the nautical expressions to which we are accustomed, is that this is to be the rate at which the vessel is going over the ground, but there is another equally well-known expression which in the river seems to me to be more apt, that is, the rate at which she is going by the land, that is, by any fixed object on the land. Therefore the difficulty of judging of the rate of speed seems to me to vanish.

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Then comes the question whether the two rules must be construed both alike. That would lead to a difficulty which is supposed to suggest itself under the second rule. There are, as Mr. Butt and Dr. Phillimore pointed out, questions of contrary difficulties. There are difficulties both ways, and I cannot say that I think it is a well drawn rule, but I agree with Mr. Butt that the difficulty which he puts against Dr. Phillimore is greater than the difficulty which Dr. Phillimore puts against Mr. Butt. That which governs me is, I think, the real impossibility of supposing that anybody would allow a steamer to go in a crowded river with the tide past the land at the rate of ten or eleven miles in the hour. I therefore venture to differ from the learned Judge of the Admiralty Court as to the construction of this rule.

LINDLEY, L.J. I also am of opinion that the construction put upon the 22nd rule by the learned judge in the Court below cannot be supported. The duty of the Court is to construe these rules. Rule No. 22 is one of a series headed, "Bye-laws for regulating the navigation of steam and other ships." Now the language of rule 22, which is the one we have to deal with, is this: "No steamship shall at any time be navigated in any part of the river at a higher rate of speed than a maximum rate of six miles an hour." The question is, what does that mean? Some light is thrown upon that by rule 29, which runs thus:—"No ship shall be allowed to drift in any part of the river or harbour." Every ship must be properly navigated or moored. Therefore navigation, as I understand it, means "moving otherwise than by drifting," that is, it seems to me the motion imported to the ship by steam, her engines and so on. That is navigation as I understand it. Now we have to ascertain the rate of speed. Here again light is thrown upon this clause by other clauses which refer to "dead slow," "full speed," "half speed," "quarter speed," and so on. I confess it seems to me, speaking rather as a landsman than as a nautical man, that what was meant by that was, the rate over the land, the rate at which the ship travels from one fixed point to another, the object being to avoid collision either with fixed objects or with moving objects. If the objects are moving,

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they may be moving in the same direction or in contrary directions; or they may be at anchor. That would be the construction that I should put upon it simply from a study of the rules, and from considering the object which I conceive the rules have. But I must say I do feel considerably puzzled by the expression in the judgment that the construction put upon the rule by the Court below is the natural construction. I did not understand in what sense it could be supposed to be the natural view. But I think I understand what it is now, although I did not understand it at first. If the ship is out at sea without any visible object in sight and with no method of ascertaining the rate of speed over the ground, the only way of ascertaining the speed is by the log or by the engines, that is by the rate of the ship going through the water. That is intelligible enough, and one sees it is so. It is not possible in a moment, I suppose, to tell at what rate a ship is going, whether a steamship, or a sailing vessel, over the ground in a place where observations cannot be taken. It may be found out after a time at what rate she has been going by taking observations at certain distances between certain points, and so it may be ascertained what distance she has traversed, but there is no way that I know of except by means of the log or some other such method of ascertaining at what rate a ship is going through the water. Therefore in that sense the rate of the ship might be said to be naturally the rate of the ship through the water. But totally different considerations apply to a vessel going along a river, and the same reasoning cannot be used. At all events in England our rivers are not so wide that we cannot tell what pace we are going along the land, and that is really an answer to the observations of the respondents' counsel. His observation is quite true that it is difficult to tell at what rate the vessel is going, unless those on board have landmarks to guide them. They can tell if they have church towers or other things, or landmarks of any sort or kind which are known to navigators. Therefore the difficulty which he has suggested about the want of certainty, appears to me to be met by considering the place that the rules are dealing with. The other points that have been urged upon the Court strengthen the same view, and I confess it appears to me the true construction of this rule is that the rate of speed in

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rule 22 means rate of speed over the ground, and not rate of speed through the water. The judgment must therefore be reversed. The appeal will be allowed with costs, and the action remitted to the Court below.

Judgment reversed.

Solicitors for plaintiffs: *Gregory, Rowcliffes & Co., for Hill, Dickinson & Lightbound, Liverpool.*

Solicitors for defendants: *Pritchard & Sons, for Turnbull & Tilly, West Hartlepool.*

J. E. H.

Dec. 12.

IN THE GOODS OF JAMES DANIELL, DECEASED.

Probate—Incorporation of Papers.

A testator in a codicil referred to one gift as being contained in a list of gifts which he had previously deposited with his brother:—

Held, under the circumstances, that the whole list was incorporated by the reference in the codicil.

JAMES DANIELL, late of Chalford Hill, in the parish of Bisley, in the county of Gloucester, butcher, deceased, died on the 30th day of July, 1882.

The deceased had made his will dated the 6th of May, 1882, and subsequently on his brother visiting him during his illness, gave him the following list, which he desired his brother to take care of and attend to after his death, viz.:

"I request you to give these donations, that is—
"20*l.* towards the debt of the Tabernacle school-room.
"20*l.* to Mrs. Ann Watts.
"5*l.* to Sarah Jane Randall;
"5*l.* to Mrs. Alfred Randall;
"5*l.* to Mrs. Sarah Neate;
"5*l.* to Mrs. Eliza Twissell.
"To be given after my death from the moneys in the bank.
"James Daniell.
"Also 2*l.* to Prudence Whiting;
"Also 2*l.* to John Herbert Eastcombe,
"Dated this 26th day of May, 1882."

Afterwards, on the 30th of June, the deceased executed the following document:—

"June 30th, 1882.

"Dear Brother William,

"It is my wish and will to leave after my death, to Sarah Jane Randall, instead of 5*l.*, which I name on the legacies which I gave you, my wish is 19*l.* 19*s.* 6*d.*, besides all her wages belonging to her; and I wish you to hand over after my death, as she has been a good servant."

This document was duly executed and attested as a codicil.

Bayford, for the executors, asked for probate of the list. It was in existence at the time of the making of the codicil, and is sufficiently referred to therein, and therefore entitled to be incorporated: *Allen* v. *Maddock* (1); *Sheldon* v. *Sheldon* (2); *Van Straubenzee* v. *Monck* (3); *In the Goods of Ouchterlony* (4); *In the Goods of Widrington.* (5)

SIR J. HANNEN. The reference in the codicil to the then existing list is awkwardly made, but I think it sufficiently expresses the testator's meaning, and therefore the list may be incorporated in the probate.

Motion granted.

Solicitors: *Burton, Yeates, Hart, & Burton.*

(1) 11 Moore's P. C. 427.
(2) 1 Rob. Ecc. 81.
(3) 3 S. & T. 6.
(4) 3 S. & T. 175.
(5) 35 L. J. (P. & M.) 66.

R. A. P.

1882
Dec. 12.

ALLEN *v.* HUMPHRYS.

Married Woman—Deed of Separation—Grant of Letters of Administration to her Father.

A husband agreed by deed of separation that if his wife died intestate her next of kin should be entitled to her property.

She died intestate, leaving separate property of which she had become possessed by virtue of the deed, and the Court, notwithstanding that the husband objected, granted letters of administration to her father limited to that property.

Alice Humphrys, late of No. 6, Vine Street, Birmingham, in the county of Warwick, wife of Henry Humphrys, died on the 10th of May, 1882, intestate, without a child, leaving Abraham Allen, her father, entitled in distribution to her personal estate in case she had never been married.

The deceased was at the time of her death living separate from her husband, and by a deed of separation, dated the 23rd of March, 1882, her husband agreed (amongst other things) as follows:—

"That all real and personal property (if any) of or to which the said Alice Humphrys now is, or she, or the said Henry Humphrys in her right shall at any time or times hereafter during the joint lives of the said Henry Humphrys and Alice Humphrys become seised, possessed, or entitled by any means, and for any estate or interest whatsoever, shall and may be held and enjoyed by the said Alice Humphrys for her sole and separate use, and may be sold, given away, devised, bequeathed, or disposed of by the said Alice Humphrys without any interference or control by or on the part of the said Henry Humphrys as fully, and effectually, and in like manner in all respects as if the said Henry Humphrys were then dead: And that if the said Alice Humphrys shall die intestate as to any personal property hereby made disposable of by her as aforesaid, the same shall upon her death go to the person or persons who, under the statutes for the distribution of the effects of intestates would have been entitled thereto if the said Alice Humphrys had died absolutely possessed thereof, and having survived the said Henry Humphrys, such persons (if more than one) to take in the shares

in which the same would have been divisible between them under the same statutes."

The deceased died possessed of personal property held by her by virtue of the deed and of a policy of insurance on her own life, the premiums upon which she had paid for out of her separate property.

On her death a citation was issued on behalf of Abraham Allen, her father, calling upon the husband to permit letters of administration of her estate to be granted to the father. The husband appeared and asked that the grant be made to him.

Bayford, for the father. The husband has no beneficial interest in the property, and therefore no right to the grant: *In the Goods of Weir* (1); *In the Goods of Stephenson* (2); *In the Goods of Maychell.* (3)

Bargrave Deane, contrà. It might be necessary for the husband's protection that he should have the grant.

SIR J. HANNEN. In the absence of evidence to the contrary, I presume that the husband has no interest in his wife's property, and if he has it will be sufficiently protected by limiting the grant to the property mentioned or included in the deed.

Grant accordingly; costs out of the estate.

Solicitors for Abraham Allen: *Gamlen, Son, & Burdett.*
Solicitors for Henry Humphrys: *Collins & Wilkinson.*

(1) 2 S. & T. 451. (2) Law Rep. 1 P. & D. 287.
(3) Law Rep. 4 P. D. 74.

R. A. P.

1883
Feb. 6.

THRELFALL *v.* WILSON.

Parties—Married Women—Security for Costs.

Married women suing as plaintiffs without their husbands being joined:—
Held, since the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), not liable to give security for costs.

THE plaintiffs, Jane Threlfall and Margaret Heinston, as executrixes, propounded the will dated the 26th day of December, 1882, of Annie Wilson, late of Alfred Place, Preston, in the county of Lancaster, spinster, deceased. The defendants were legatees under a prior will.

Middleton, for the defendants, upon summons, asked for an order that the plaintiffs should give security for costs. It appeared upon affidavit that the plaintiffs were married women, and that their husbands were not parties to the action, and therefore the plaintiffs, unless they have available means of their own to pay costs, ought to give security. [He cited the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1, sub-ss. 1 and 2 (1); *Brown* v. *North*. (2)]

Bayford, contrà. It is not shewn that they have no means of paying costs. [He also cited *Noel* v. *Noel* (3) and *Martano* v. *Mann*. (4)]

THE COURT refused to make the order.

Solicitors for plaintiffs: *Chester, Mayhew, Broome, & Griffiths.*
Solicitors for defendants: *Brownlow & Howe.*

(1) The following are the sub-sections referred to:—

Sub-s. 1. A married woman shall in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a feme sole, without the intervention of any trustee.

Sub-s. 2. A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract and of suing, and being sued, either in contract or in tort, or otherwise in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her . . . .

(2) 9 Q. B. D. 52.
(3) 13 Ch. D. 510.
(4) 14 Ch. D. 419.

R. A. P.

BLANDFORD *v.* BLANDFORD. 1883

Desertion—Condonation—Revival. *Feb.* 10.

A husband having been guilty of desertion and adultery the wife forgave him and they returned to cohabitation. He subsequently committed adultery:—

Held, that the subsequent adultery revived the desertion, and that the wife was entitled to a dissolution of the marriage.

THIS was a petition for dissolution of marriage by Albertha Frances Anne Spencer Churchill, commonly called the Marchioness of Blandford, against George Charles Spencer Churchill, commonly called the Marquis of Blandford.

The parties were married on the 18th of November, 1869, and lived together until the autumn of 1875, when the respondent left his home and cohabited with Lady Aylesford. On the 18th of November following the parties met for a short time at an hotel, and in the month of February, 1876, the respondent paid the petitioner a visit and announced his determination never to live with her again. Several letters then passed between them, and on the 8th of March, 1876, they met, when he refused to give up his intimacy with Lady Aylesford, and they parted. In 1878 the petitioner, being unable to obtain any regular income from the respondent, a petition for judicial separation was filed on her behalf but was not proceeded with, as a deed of separation securing her a maintenance was executed. On the 13th of May, 1878, they met in Paris, and in the month of July following lived together again, and continued to do so until the 25th of April, 1882, when the petitioner discovered that the respondent had again committed adultery with Lady Aylesford. She thereupon separated from him and instituted this action.

The petition also charged the respondent with having been guilty of cruelty, but as only one act of violence was proved, the charge was not insisted upon.

Inderwick, and *Searle*, for the petitioner. Although the desertion has been condoned, it has been revived by the subsequent adultery, and the petitioner is therefore entitled to a dissolution of her marriage: *Palmer* v. *Palmer* (1); *Newsome* v. *Newsome*. (2)

(1) 29 L. J. Rep. (P. M. & A.) 124. (2) Law Rep. 2 P. & D. 306.

1883

BLANDFORD v. BLANDFORD.

[As to the effect of a deed of separation upon desertion, the case of *Knapp* v. *Knapp* (1) was cited.]

Charles Hall, Q.C., and *Lehmann*, for the respondent.

SIR J. HANNEN. I entertain no doubt as to the principle upon which I ought to act. It is clear that the petitioner had become aware of the respondent's connection with Lady Aylesford, and that she had offered, and would have been glad, to receive him back if he would have abandoned that connection. This he refused to do, and for a period of two years and upwards remained away from the petitioner. There had therefore been legal desertion for the requisite period, and the petitioner would have been entitled, by reason of the adultery and desertion, to institute a suit for dissolution of marriage.

For reasons which reflect credit upon her the petitioner at that time abstained from insisting upon her rights, and when that event happened which she had hoped for, namely, the separation of her husband from Lady Aylesford, she received him back, and thereby condoned his past offences.

But the letters show that she forgave him on condition that he "sinned no more," and that is the legal definition of condonation. It is forgiveness upon condition that no matrimonial offences shall be committed for the future. It has been held in the cases cited that where the right has thus accrued from a combination of matrimonial offences to have the marriage dissolved, if one of these offences is committed again, that combination is revived. Adultery revives cruelty, cruelty revives adultery, and I can see no reason in principle why subsequent adultery should not revive the right of the wife to complain of the desertion as well as of the adultery of the past. I therefore consider that the petitioner is entitled to succeed, and I accordingly pronounce a decree nisi with costs.

Solicitor for petitioner: *A. W. White.*

Solicitors for respondent: *Lewis & Lewis.*

(1) 6 P. D. 10.

R. A. P.

[IN THE COURT OF APPEAL.]

1883
Feb. 12.

MASON *v.* MASON.

Dissolution of Marriage—Unreasonable Delay—Poverty of Petitioner—Previous Decree for Judicial Separation.

A husband in 1878 obtained a judicial separation, and 50*l.* damages against the co-respondent, but he took no steps to recover the damages. The wife continued to cohabit with the co-respondent, and in 1882 the husband petitioned for a dissolution of his marriage. The reason which he gave for the delay and for not enforcing the claim for damages was that he had no money, being only in receipt of weekly wages, and that he hoped his wife would come back and live with him:—

Held, reversing the decision of the President, that the delay was not unreasonable, and that the petitioner was entitled to a decree.

THIS was an appeal from a decree of the President of the Probate Division dismissing a petition by a husband for dissolution of marriage on the ground of unreasonable delay. (1)

The petitioner and the respondent were married in 1871, and in 1875 the respondent committed adultery with the co-respondent, who was a baker in Rotherham, and lodged in the same house as the petitioner. The petitioner forgave this act of adultery, and gave up his business at Rotherham and took his wife with him to Leeds, where he obtained work as a warehouseman.

In March, 1877, the petitioner and his wife paid a visit to Rotherham, where the respondent again committed adultery with the co-respondent, and refused to return to her husband. He accordingly presented a petition for judicial separation, in which he claimed damages against the co-respondent. In November, 1878, a decree for judicial separation was made, and 50*l.* awarded to the petitioner as damages, which however the petitioner did not enforce against the co-respondent.

The respondent and co-respondent still continued to live together; and the petitioner, in March, 1882, filed a second petition praying for a dissolution of marriage by reason of the adultery committed since the last suit. The petition was not opposed, but the President held that the petitioner had been guilty of unrea-

(1) 7 P. D. 233.

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MASON v. MASON.

sonable delay, and dismissed the petition. The petitioner appealed from the decision.

C. A. Middleton, for the petitioner. The fact of a previous decree for judicial separation having been obtained is no objection to the present suit: *Green* v. *Green*. (1) The judge in the Court below refused the petition on the ground that the petitioner had been guilty of unreasonable delay. But when the circumstances are considered there has been no such delay as disentitles the petitioner to relief: *Pellew* v. *Pellew* (2); *Tollemache* v. *Tollemache*. (3) If the Court should think that the delay has not been sufficiently accounted for, fresh evidence can be adduced on that point.

The Court thought it reasonable that this should be done; and accordingly the petitioner was sworn. He deposed that in 1878 he was a warehouseman receiving wages of 26*s*. a week. With the exception of 60*l*. he had no other property. He expended that sum in paying the costs of the former suit. He took no steps to enforce the claim for damages or costs against the co-respondent, because he had no money. For the same reason he did not sooner take proceedings for a dissolution of marriage. He also hoped for about two years that his wife would come back and live with him.

The respondent and co-respondent did not appear.

JESSEL, M.R. It is unnecessary to say what conclusion I should have arrived at if we had not admitted further evidence. But counsel, not having been aware of the difficulty which existed in the mind of the President of the Divorce Court on this point, gave no explanation in the Court below of the delay in the period between the decree in the former suit and the commencement of the present suit. The petitioner has now been examined, and he says that he had no means of prosecuting a suit for dissolution of marriage, or for enforcing the decree against the co-respondent in the former suit. He also says that he postponed taking proceedings for a dissolution of marriage because he hoped that his

(1) Law Rep. 3 P. & M. 121. (2) 1 Sw. & Tr. 553.
(3) 1 Sw. & Tr. 557.

wife would return to him. He had forgiven her on a former occasion and she came back, and he hoped that she would again; and he says that he continued to entertain that hope for two years. Therefore we cannot consider the delay as beginning immediately after the decree for judicial separation. I feel great difficulty in differing from a judge of such experience as the President of the Probate Division, but looking at this fresh evidence and at all the circumstances of the case, I think there has not been such unreasonable delay as ought to prevent the granting of this petition; and that we shall not be doing wrong in making a decree nisi for a dissolution of marriage.

LINDLEY, L.J. I am of the same opinion. The first difficulty which I had is removed by the authority of *Green* v. *Green*. (1) It seemed to me at first sight strange that after a decree for judicial separation a man could file a petition for dissolution of marriage. But *Green* v. *Green* (1) appears to be an authority that such a course can be adopted, and it was really a stronger case than the present. Thus it becomes a matter of discretion for the Court whether to grant a decree in such a case. Without the additional testimony which has been given to-day I should not have differed from the Court below, but having regard to the explanation of the delay now given, and to the cases cited, I think that the delay has been sufficiently accounted for, and that we may make the order.

BOWEN, L.J. I think that the further evidence has explained the delay which without explanation would have seemed unreasonable. The order appealed from must therefore be reversed, and a decree nisi for dissolution of marriage must now be made.

Appeal allowed.

Solicitors for petitioner: *Gregory, Rowcliffes, & Co., for G. E. Pickering, Leeds.*

(1) Law Rep. 3 P. & M. 121.

M. W.

1883
Jan. 30.

THE LIVIETTA.

Salvage—Derelict—Amount of Award—Apportionment.

The master of a Norwegian brig bound to Cardiff, with a crew of nine men, fell in, in the North Sea between Heligoland and the Dogger Bank, with a derelict vessel in a very crippled condition, and put his mate and two of his crew on board her. The mate and the two men on board the derelict, shortly after they had boarded her, fearing that she was about to founder, endeavoured to leave her, but their boat was swamped, and one of the men drifted astern, and was picked up by a fishing smack. The mate and the other hand succeeded in bringing the derelict safely into the English Channel, and within three miles of Dungeness; she was then taken in tow by a steamship and towed to the entrance of Dover Harbour, within which she was subsequently placed in safety.

Actions of salvage were instituted by the owners, master, and crew of the brig, and by the owners, master, and crew of the steamship against the derelict vessel and her cargo, and the Court awarded a moiety of the value of the property proceeded against, and apportioned three-fifths of the amount to the owners, master, and crew of the brig.

THESE were two actions of salvage instituted, one on behalf of the owners, master, and crew of the Norwegian brig *Julie,* and the other on behalf of the owners, master, and crew of the British steamship *Walton,* against the Italian brig *Livietta,* her cargo and freight. An appearance in each action was entered on behalf of the owners of the cargo of the *Livietta,* and afterwards the cargo of the *Livietta* was with their consent sold by the marshal of the Court, and the net proceeds of the sale, amounting to about 1344*l.*, were paid into Court. An appearance in each action was also entered for the owners of the *Livietta.*

Two separate statements of claim were delivered. That delivered on behalf of the owners, master, and crew of the *Julie* alleged, so far as material, as follows:—

1. The brig *Julie,* of 257 tons register, belonging to the port of Arendal, in Norway, at the time of the events hereinafter narrated, was bound on a voyage from Arendal to Cardiff with a cargo of mining timber, and manned by a crew of nine hands all told. The value of the *Julie* is about 2000*l.*

2. On the 13th of November, 1882, at about 9 A.M., the *Julie,* in the course of the voyage, was between the Dogger Bank and Heligoland, in about 54.53 north latitude and 5.12 east

longitude, when those on board her observed about two miles off a brig laying to with two lower topsails and foretopmast staysail set and with a jack flying from the foretop. At such time there was a light easterly wind.

3. The master of the *Julie* bore down for the brig, and sent his mate and two men in a boat to her, by whom she was found out to be the *Livietta*, an Italian brig laden with wheat, derelict and in a very crippled condition.

4. The master of the *Julie* determined to try and take the *Livietta* into a place of safety, and accordingly the mate and the same two men returned on board her in the pram of the *Julie* with a compass, chart, and some provisions, and it was arranged that the *Julie* should endeavour to sail ahead of the *Livietta*, and that the *Livietta* should follow according to her signals. At this time there was two feet and a half of water in the hold of the *Livietta*, her pumps were choked, her pump gear was missing, and she had no anchors.

5. The mate and the two men then set all the sails except the royals of the *Livietta* and followed the *Julie*, steering about south-west. In the afternoon the wind increased, till at 8 P.M. it was blowing fresh. At dusk the sidelights of the *Livietta* were lighted, but the oil was so bad that they had constantly to be taken down and pricked up and trimmed.

6. At midnight the wind had increased to a gale from the east, with a high sea, and the *Livietta* laboured very much. The top-gallant sails were then taken in. At 4 A.M. on the 14th of November the wind and sea increased still more, and all sail was taken in except the lower topsails and foresail. This was a work of great difficulty as there were only two men to work the sails, the mate having to remain at the wheel. During this night attempts were made to pump the *Livietta*, but being ineffectual were discontinued. The *Julie* was in sight all night.

7. At 8 A.M. the wells gave three feet and three quarters of water, but the *Livietta* was down by the head about a foot, and there was more water forward. At 10 A.M. those on the board the *Livietta* fearing to lose sight of the *Julie* in the boisterous weather, and fearing the *Livietta* would founder as the water was increasing, clewed up their foresail and signalled the *Julie*.

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8. The *Julie* approached as close as she could in safety and passed under the stern of the *Livietta*, and those on board the *Livietta* signalled that they wished to leave her as they were afraid to stay on board.

9. With great difficulty the stern of the pram of the *Julie*, which was on board the *Livietta*, was lifted over the rail on the lee side, and the bow was raised by the united efforts of the three men. The *Livietta* rolled very much, and the sea was nearly level with the rail. The three men then forced the pram off into the sea and jumped into her, but before they could clear the ship the sea swept over and filled the pram, whereupon one of the men, Pohlsen, jumped into the main channels and with great difficulty got back on board the *Livietta*. Before jumping into the pram the men had taken off their coats and boots, and those articles, together with their oilskins, were lost with the pram.

10. The mate meanwhile hung on to the mainsheet, which he had clutched in jumping. He was then assisted on board the *Livietta* by Pohlsen, who had already got on board her, otherwise he must have become exhausted and dropped into the sea.

11. The third hand, Mortensen, drifted astern in the swamped boat, and was ultimately rescued by means of a lifebuoy by the fishing smack *Otter*, of Ramsgate, and taken to Ramsgate.

12. The mate and Pohlsen then signalled the *Otter* to come to them, but after making several tacks, and not being able to make the *Livietta* in consequence of the roughness of the weather, she gave up the attempt.

13. In the meanwhile the lifeboat of the *Julie* was launched, and an endeavour was made to get to the *Livietta*, but had to be abandoned.

14. The two men on board the *Livietta* then manœuvred her and went astern and to leeward of the *Julie* and backed their foretopsail. The lifeboat of the *Julie* then made another attempt but before she got clear she was swamped and damaged, and the oars were washed out of her and the men jumped on board the *Julie* again.

15. At 12 noon on the 14th of November it was still blowing a gale, and the *Julie* finding she could do nothing at the time to

help those on board the *Livietta*, signalled them to follow her and continued her voyage. The *Julie* endeavoured to keep by the *Livietta* but was lost sight of in the course of the afternoon.

16. At noon on this day, by dead reckoning, the *Livietta* was in about lat. 52.36 N., and long. 4.11 E., and those on board her determined to try and make the English Channel.

17. At 4.30 P.M. those on board the *Livietta* sighted the North Hinder Light and steered close to it under her lower topsails, staysail, and jib. It was then blowing very heavily. Those on board the *Livietta* signalled the lightship for assistance but they were waved off.

18. A course was then shaped for Dover, and at midnight the South Foreland Light was sighted bearing west-south-west, distant about twenty miles. After this the East Goodwin and South Sand Head lights were sighted, the course still being shaped for Dover and signals for assistance still being made.

19. Those on board the *Livietta* steered clear of the numerous sands and shoals in the locality and burnt flare up lights for a pilot or tug, but none appeared. By this time the water had increased to five feet, the wind had decreased but the sea had got worse and was running very high.

20. Towards morning on the 15th of November the wind became northerly and the *Livietta* drifted from the shore, and at 8 A.M. those on board her sighted the Varue Light. They then tacked the ship in towards the land, and at noon sighted Dungeness two or three miles distant, having previously lowered the foresail and mainsail.

21. During the morning signals were hoisted for a pilot or tug but were not answered, and those on board the *Livietta*, thinking it dangerous to delay longer, hoisted a piece of canvas with a knot in it as a signal of distress in the main rigging.

22. Thereupon the screw steamship *Walton*, of London, approached the *Livietta* and sent a boat to her, and it was arranged that the *Walton* should tow the *Livietta*. A rope was brought from the *Walton* and made fast on board the *Livietta*, and at about 1.30 P.M. on the 15th of November the *Walton* took the *Livietta* in tow, four hands from the *Walton* remaining on board the *Livietta* to assist in clewing up the sails.

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23. The *Walton* towed the *Livietta* till about 4.30 P.M. when the two ships were off Dover Harbour, when she cast the *Livietta* off, and the Dover tug, by arrangement with those on board the *Walton*, took hold of the *Livietta* and towed her into Dover Harbour, where she was given up to the receiver of wrecks with five and a half feet of water in her hold amidships.

24. After the *Julie* lost sight of the *Livietta* she experienced very severe and adverse weather in the channel. In consequence of her being shorthanded by reason of the absence of three of her hands, her crew underwent much extra fatigue and exertion, the master in particular had to be constantly on deck, as there was no other navigating officer. She was off the Lizard three times and was three times driven back, and on the 23rd of November she had to put into Falmouth as a harbour of refuge with the loss of her lower foretopsail. Her mate and two men did not rejoin her till the 29th of November at Falmouth. She had to make two attempts to get out of Falmouth, and she did not arrive at Cardiff till the 16th of December, thus losing in rendering the said salvage services about twenty-four days, and being put to considerable expense at Falmouth.

25. At the time the *Julie* fell in with the *Livietta* the latter was in a position of great danger, and but for the services of the plaintiffs must have been lost with her cargo. By the said services, which were rendered with great skill and promptitude, and in very adverse circumstances, the *Livietta* and her cargo were rescued and brought into a place of safety.

26. In rendering the said services those on board the *Livietta* underwent great hardships. Their coats, boots, oilskins, and changes of clothing were lost with the pram, and the bulwarks of the *Julie* were slightly damaged. In consequence they were constantly exposed to the weather and had no change to put on, and their feet being uncovered were very much swollen and sore when they arrived at Dover. Except on one occasion, they were unable to light a fire on board the *Livietta* or to cook their food. They had very little to eat or drink, were unable to go to sleep during the whole time they were on board the *Livietta*, and were in constant fear of her foundering, especially between 4 P.M. of the 13th and 12 P.M. of the 14th.

27. The third man, Mortensen, who was rescued by the smack, was in most imminent peril of life.

28. The plaintiffs, the owners of the *Julie*, have paid 10*l.* to the crew of the *Otter* for rescuing Mortensen and taking him to Ramsgate, and for their loss of time and some damage sustained by them. The owners of the *Julie* incurred 10*l.* of expenses by reason of the *Julie* having to put into Falmouth, and 25*l.* 8*s.* 2*d.* for the expenses of the men at Dover and Ramsgate and of their journeys to Falmouth and for clothes to replace those lost. Besides this they lost the *Julie's* lower foretopsail of the value of 8*l.*, and the value of the pram which was lost, and the damage to the other boat with the loss of their oars, and the damage done to the *Julie's* bulwarks amount to the sum of 10*l.*, making in all 63*l.* 8*s.* 2*d.*

The statement of claim on behalf of the owners, master and crew of the *Walton*, alleged substantially as follows:—

"1. The steamship *Walton*, of London, of 688 tons register, with engines of ninety-nine horse power nominal, at the time of the events hereinafter narrated was bound on a voyage from Arzou, in Algiers, to Leith and Newcastle, with a cargo of esparto grass and a crew of nineteen hands all told.

"2. In the course of the said voyage, about noon of Wednesday, the 15th of November, 1882, the *Walton* was off Dungeness, which bore north, distant about seven miles; the wind was at this time blowing a hard gale from the north with a strong sea.

"3. In these circumstances, those on board the *Walton* observed about six miles off, bearing about south south-east, a brig flying signals of distress about halfway up the starboard main rigging. The sails were observed to be flying about in great confusion, and she was driving towards the French coast with her head to the westward. The *Walton* bore down to the brig, which proved to be the *Livietta*.

"4. A boat was sent from the *Walton* with her chief mate and four men, who got on board with difficulty, and then discovered that there were only two men on board the *Livietta*, and that they were not part of her original crew, but had been put on board her by the *Julie*, which had found the *Livietta* derelict in the North

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Sea. The said men had drifted with her through the Straits of Dover without getting any help, and were in a state of great exhaustion, and wanted to be towed into a place of safety.

"5. After some difficulty the eleven-inch tow-rope of the *Walton* was got on board the *Livietta*, and made fast, but the two men on board the *Livietta* were unable to render any assistance from exhaustion and exposure in getting the tow-line on board, in stowing sails, or navigating the ship, and the *Walton* began to tow her towards Dover, the chief mate of the *Walton* and two men remaining on board the *Livietta*, to stow the sails and make her ready for harbour.

"6. The *Walton* then commenced to tow the *Livietta* towards Dover, and towed her for about an hour, when the master of the *Walton* observed that the sails of the *Livietta* were not being stowed. He thereupon sent a boat with four hands to the *Livietta*, and two of the hands were put and remained on board her to assist. The mate and the four hands of the *Walton* then stowed the sails and got out ropes, and made all necessary and proper preparations for entering harbour.

"7. The *Walton* arrived off Dover Pier at 4.30 P.M., with the *Livietta* in tow, and the master of the *Walton* then agreed with those on board a tug-boat that they should tow the *Livietta* into safety for 10*l*. The master of the *Walton* also engaged boat assistance for 3*l*. and a pilot at the usual scale, namely 4*l*. The *Livietta* was towed by the tug into Dover Basin, where she took the ground. A rope was got out by the *Walton's* crew, the hired boat running away the rope by which she was made fast to the buoy, and she was handed over to the receiver of wrecks by the master of the *Walton*, whose crew returned to the *Walton*.

"8. The said brig *Julie*, had originally put three men on board the *Livietta*, all of whom finding that they could not navigate her, attempted to leave her in order to return to their own vessel. The boat of the *Julie*, however, broke adrift when only one man had got into her, and the other two men were therefore compelled to remain on board the *Livietta*.

"9. At the time of receiving the afore-mentioned services, the *Livietta* and the two men on board her, were in a position of extreme danger. The men were too exhausted and had not

strength enough to set her sails, which were in a state of confusion, she had no anchors, and her pumps were choked and useless. She had from six to seven feet of water in her hold, and her cargo of grain was wet and deteriorating rapidly, and required immediate attention and warehousing to save it from being rendered wholly damaged and useless.

" 10. In rendering the said services the *Walton's* new eleven-inch hawser was considerably damaged. The plaintiffs have paid 10*l.* to the tug, 3*l.* for boat assistance, and 4*l.* for the pilot."

After the delivery of the above-mentioned statements of claim, the actions were consolidated, and the solicitors for the owners of the cargo of the *Livietta* tendered to the plaintiffs the sum of 500*l.* in respect of the salvage services rendered to the cargo of the *Livietta*, and subsequently delivered a statement of defence in the consolidated action, which, after admitting the allegations contained in the statement of claim delivered by the owners, master, and crew of the *Julie*, other than those in the 24th and 25th paragraphs thereof, to be true, and, in answer to the statement of claim of the owners, master, and crew of the *Walton*, denying that at the time of the services of the *Walton* the men on board the *Julie* were in extreme danger, pleaded the tender of 500*l.* above-mentioned, as sufficient to satisfy the joint claims of the plaintiffs against them.

No statement of defence was delivered on behalf of the defendants, the owners of the *Livietta*, but their solicitors consented to be bound by such judgment as the Court should pronounce upon the issues raised upon the pleadings delivered on behalf of the plaintiffs and of the owners of the cargo of the *Livietta*.

No witnesses were called.

G. Bruce, for the owners, master, and crew of the *Julie*, as to the amount to be awarded for the services rendered, cited *The Rasche*. (1)

W. G. F. Phillimore, for the owner, master, and crew of the *Walton*.

Bucknill, for the defendants, the owners of the cargo of the *Livietta*, admitted the truth of the allegations in the statements of

(1) Law Rep. 4 A. & E. 127.

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claim, but contended that, so far as regarded the cargo of the *Livietta*, the sum tendered was sufficient remuneration for the services rendered.

Jan. 30. The action was heard before the judge, assisted by two of the Elder Brethren of the Trinity House.

SIR ROBERT PHILLIMORE. I pronounce against the sufficiency of the tender made by the owners of the cargo of the *Livietta* in this case. And I award a moiety of the value of the property proceeded against as salvage remuneration for the services rendered by the plaintiffs. Of this award I apportion three-fifths to the owners, master, and crew of the *Julie*. The owners, master, and crew of the *Walton* will receive the remainder of the moiety, and I allot two-thirds of this remainder to the owners of the *Walton*.

Solicitors for the owners, master, and crew of the *Julie*: *Waddilove & Nutt.*

Solicitors for the owners, master, and crew of the *Walton*: *Ingledew & Ince.*

Solicitors for the owners of the cargo of the *Livietta*: *Waltons, Bubb, & Walton.*

G. B.

Feb. 6.

THE PESHAWUR.

Damage—Lis Alibi Pendens—Stay of Proceedings.

In an action of damage in personam by the owners of the ship *G.* against the owners of the ship *P.* it appeared that a cause of damage in rem relating to the same collision had, prior to the proceedings in this Court, been instituted by the owners of the *P.* against the *G.* in a Vice-Admiralty Court abroad, and was then pending. The Court, on the application of the owners of the ship *P.*, stayed the proceedings in this Court until after the hearing of the cause in the Vice-Admiralty Court abroad.

THIS was an action of damage in personam instituted on the 6th of December last on behalf of the owners of the vessel *Glenroy* against the Peninsular and Oriental Steamship Company, the owners of the steamship *Peshawur*, to recover the damages sustained by the *Glenroy* in a collision which occurred

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between the two vessels in the Indian Ocean, near Colombo, in the island of Ceylon, on the 15th of October last.

The Peninsular and Oriental Steam Navigation Company appeared in the action, and on the 30th of January last their solicitors took out a summons calling upon the plaintiffs to shew cause why all the proceedings in the action should not be stayed, on the ground that proceedings were at the date of the summons pending between the same parties in the Vice-Admiralty Court of Ceylon, for the same cause of action, namely, the collision between the *Glenroy* and the *Peshawur*.

In support of the summons an affidavit was brought in, in which it was stated that the defendants had on the 17th of October telegraphed to their agents at Colombo to take proceedings against the *Glenroy* in the Vice Admiralty Court of Ceylon; that such proceedings were subsequently and before the 9th of December instituted accordingly; that the *Peshawur* was at the date of the affidavit on a voyage to Calcutta, and would call at Colombo; and that the case could be heard without delay on the arrival of the defendants' witnesses in Ceylon; whilst the *Glenroy* was a regular trader between Calcutta and ports in the Indian Ocean, and there was no possibility of either her master or her crew coming to this country. A counter affidavit was filed, in which a member of the firm of solicitors for the plaintiffs alleged that the owners of the *Glenroy* had not taken any proceedings against the *Peshawur* other than the action instituted by them in this Court; and had not made and could not make any counter-claim in the cause alleged to be pending in Ceylon; that both the plaintiffs and the defendants were domiciled and resident in this country, and no expense would be saved in trying the action in Ceylon; and that even if the plaintiffs could obtain judgment against the defendants in Ceylon, the defendants were not known to have any property there on which a levy could be made.

The summons came on in chambers, and was adjourned into Court.

Roscoe, for the defendants, in support of the summons.

W. G. F. Phillimore, for the plaintiffs, contrà.

It was admitted that the only proceedings taken by the owners

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of the *Peshawur* in Ceylon in respect of the collision were proceedings in the Vice-Admiralty Court of Ceylon in rem against the *Glenroy*, and that they had been commenced before the issue of the writ in the action here, and were still pending.

SIR ROBERT PHILLIMORE. There are two questions raised in this case, first, whether I have the power in my discretion to direct a stay of the proceedings in the action brought in this Court by the owners of the *Glenroy* against the Peninsular and Oriental Steam Navigation Company; and secondly, whether, if I have this power I ought in the circumstances to exercise it in favour of the defendants in the action here. Now I think I have a discretion as to whether I should stay the proceedings here or allow them to go on, and I shall exercise this discretion in favour of stopping all proceedings in the action in this Court until after the suit at Colombo has been heard. (1)

Solicitors for plaintiffs: *Gregory & Co.*
Solicitors for defendants: *Freshfields & Williams.*

G. B.

Nov. 3.

THE IMMACOLATA CONCEZIONE.

County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71), *s.* 6—*Transfer of Action after judgment recovered—Pending Actions in High Court—Discretion.*

A foreign vessel was under arrest in three actions of necessaries, one in the City of London Court and the other two in this Court, and after judgment pronounced in the City of London Court was about to be sold by the bailiff of that Court. In these circumstances the plaintiff in one of the actions in this Court applied for an order to transfer the action in the City of London Court to this Court, alleging that a sale by the marshal would be to the benefit of all parties.

The Court made the order, but directed that it should be without prejudice to any priorities claimed by the plaintiff in the action ordered to be transferred.

ON the 15th of September, 1882, an action of necessaries was instituted in the City of London Court on behalf of Messrs. Emerson, Walker & Co. against the foreign vessel *Immacolata*

(1) Against this order the defendants, the owners of the *Peshawur*, appealed, but before the appeal came on for hearing the action in this Court was settled by arrangement between the parties.

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Concezione, and the same day, on an affidavit being filed which stated that the *Immacolata Concezione* was under repair in Messrs. Carter's dry dock, Milwall, and on completion of such repairs would leave the jurisdiction of the City of London Court, she was arrested in the action by the bailiff of that Court, and an officer employed by him was placed on board her. On the 19th of September the owners of the *Immacolata Concezione* appeared in the action, but did not put in bail or give an undertaking in lieu of bail.

Whilst the *Immacolata Concezione* was under arrest in the above-mentioned action two actions of necessaries were commenced against her in this Court, one (Folio 327, 1882), instituted on the 18th of September, 1882, on behalf of Messrs. Seward & Co., and the other (Folio 331, 1882), instituted on the 21st of the same month on behalf of Mr. Alfred Carter, and in each of these actions she was arrested by the marshal of this Court on the day on which the suit was instituted. It appeared from the writs and affidavits to lead the warrants in the two last-mentioned actions that the claim of Messrs. Seward & Co. amounted to 2800*l.*, and the claim of Mr. Carter to 2500*l.*, and that the latter firm claimed a possessory lien on the vessel in respect of the necessaries alleged to have been supplied by them.

On the 25th of September last the solicitors for Mr. Carter applied to the registrar of this Court to order the action in the City of London Court to be transferred to this Court, and the registrar, after hearing the solicitors for the plaintiffs and defendants in the City of London Court action, rejected the application on the ground that the applicants were not parties in the City of London Court action, but directed the marshal to remove the *Immacolata Concezione* from Messrs. Carter's dry dock to Milwall Dock without prejudice to the possessory lien claimed by Mr. Carter. In pursuance of this direction the *Immacolata Concezione* was shortly afterwards removed by the marshal to Milwall Dock.

On the 11th of October last the action in the City of London Court was heard, and the defendants not appearing, the judge of the City of London Court adjudged that the plaintiffs should recover against the owners of the *Immacolata Concezione* and the *Immacolata Concezione* the sum of 105*l.* and costs, and that in

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default the registrar of the City of London Court should issue a warrant of execution against the property of the owners of the *Immacolata Concezione* and the *Immacolata Concezione.* The amount of this judgment not having been paid by the defendants, the registrar of the City of London Court, on the 27th of October, issued a warrant of execution directing the bailiff of the City of London Court to make and levy by distress and sale of the *Immacolata Concezione* the sum of 149*l.* 18*s.*, including the costs of the execution. On the same day the bailiff of the City of London Court, whose officer had remained on board the *Immacolata Concezione* since she had been arrested on the 15th of September, endorsed on the warrant of execution that he had levied and distrained for the amount therein mentioned, and forthwith gave notice to Mr. Carter's solicitors that he was about to proceed to advertise and sell the *Immacolata Concezione* in satisfaction of the judgment of the City of London Court.

On or about the 30th of October the master and crew of the *Immacolata Concezione* instituted an action of wages against her in this Court, and therein claimed to recover 473*l.* 11*s.* 3*d.* as wages earned by them and compensation recoverable as wages.

On the 31st of October last Mr. Carter entered an appearance as intervener in the action in the City of London Court, and thereupon his solicitors gave notice of motion to the plaintiffs in that action that this Court would be moved on his behalf for an order to transfer the said action to this Court.

In support of the motion an affidavit was brought in, which stated that the bailiff of the City of London Court had given notice that he was about to advertise and sell the *Immacolata Concezione,* notwithstanding the two arrests of such vessel by the marshal of this Court and the possessory lien of Mr. Carter, and that Mr. Carter had been advised and believed that if a sale of the vessel was made by the bailiff of the City of London Court the ship would be sold for a nominal amount, having regard to the fact that she could not be delivered to the purchaser except subject to the said assets; that great and unnecessary expense would arise from an attempted sale and his rights would be greatly prejudiced; and that, even if the ship sold to the best advantage, the net proceeds of the sale would be insufficient to

satisfy the claims upon her. The affidavit further stated that Mr. Carter's solicitor was advised and believed that it would be for the benefit of all parties that the order for transfer should be made and the vessel sold by the marshal in the ordinary course.

Nov. 3. The motion to transfer the action in the City of London Court to this Court was heard before the judge in court at the same time as a motion on behalf of the Messrs. Emerson, Walker, & Co. to direct that the marshal be restrained from preventing or interfering with the sale of the *Immacolata Concezione* in such action pursuant to the above-mentioned warrant of execution, or for such other order as the Court should think fit to make.

W. G. F. Phillimore, for Mr. Carter, in support of the motion for transfer. As Mr. Carter is now a party to the action in the City of London Court, this Court has by virtue of the 6th section of the County Courts Admiralty Jurisdiction Act, 1868, undoubtedly power to transfer that action to this Court, and the only question for decision can be whether this Court in its discretion will exercise the power it possesses. It is submitted that it will. It has been the invariable practice of the Court of Admiralty and of this Court to grant applications for transfer under the County Courts Jurisdiction Act, 1868, where, at the time of the application, there were suits pending against the ship in the Court of Admiralty or this Court, and in the present case not only are there suits pending here against the *Immacolata Concezione*, but in the special circumstances of the case it will clearly be for the advantage of all the claimants against the vessel that the proceedings for sale should be conducted in this Court, and the distribution of the proceeds take place before one and the same tribunal. If the proposed transfer is made the legal position of Messrs. Emerson, Walker, & Co. will be in nowise altered, and any valid claim to priority of payment which they may have acquired by having been the first to take proceedings and obtain judgment will have due effect given to it. At the same time it is difficult to understand how a claim in respect of which a possessory lien existed when the vessel was first arrested can be postponed to a judgment by default, obtained at a time when this Court was not sitting.

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G. Bruce, for Messrs. Emerson, Walker, & Co. Even if the Court has jurisdiction to transfer an action tried in a Court having County Court Admiralty jurisdiction after judgment has been obtained and execution levied, it ought to decline to order a transfer where, as is the case here, the effect of doing so will be to prevent the plaintiffs in the action proposed to be transferred reaping any advantage from the judgment they have obtained until all other claims against the vessel have been adjudicated upon and settled. If Mr. Carter intended to set up the rights of the holder of a possessory lien against Messrs. Emerson & Co.'s claim, he ought to have intervened in the City of London before the case was tried there. Not having done so he must be considered to have waived any claim to precedence on that ground, and not to be entitled to any indulgence at the hands of the Court. The Court ought to pay due regard to the decree of the City of London Court, and restrain the marshal from interfering with the carrying out of such decree.

SIR ROBERT PHILLIMORE. I shall direct that the action in the City of London Court be transferred to this division of the High Court, and that such transfer be made without prejudice to the rights of priority (if any) possessed by the plaintiffs in that action. So much of the motion on behalf of those plaintiffs as asks for an order to restrain the marshal from preventing or interfering with the sale of the *Immacolata Concezione* by the bailiff of the City of London Court must be rejected.

G. Bruce asked for leave to appeal.

SIR ROBERT PHILLIMORE. I will give you leave to appeal.

On the 10th of November last the proceedings in the action instituted by Messrs. Emerson, Walker, & Co. in the City of London Court were filed in the registry of this Court. On the 21st of November last counsel on behalf of Messrs. Emerson, Walker, & Co. moved the judge in Court to direct that the marshal be at liberty to sell the *Immacolata Concezione* by virtue of the above-mentioned judgment obtained in the City of London Court on the 11th of October last, and that Messrs. Emerson, Walker,

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& Co. be paid out of the proceeds of such sale the amount of the said judgment and costs and charges incidental to the said judgment and execution, and of the said sale and of the transfer of the action. Thereupon the judge, after hearing counsel for the parties in the several above-mentioned actions against the vessel, decreed her to be appraised and sold, reserving all questions as to priority of payment out of the proceeds of sale when brought into Court.

On the 19th of December last the two actions of necessaries instituted respectively on behalf of Messrs. Seward & Co. and of Mr. Carter were heard in Court, and the judge pronounced for the claims of the respective plaintiffs in such actions subject to any references which might be necessary, and reserving all questions as to the rights of such plaintiffs to priority of payment (1).

Solicitors for Mr. Carter: *Cooper & Co.*
Solicitors for Messrs. Emerson & Co.: *Stocken & Jupp.*

G. B.

THE ELIN.

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Aug. 1.

Damage — Priority of Damage Claimant over Claimants for Wages earned subsequent to Collision.

The maritime lien, arising out of damage done by a foreign vessel in a collision for which she is to blame, takes precedence of the maritime lien of the seamen on board such vessel at the time of collision for wages earned by them subsequently to the collision.

The Linda Flor (Swa. 309) followed.

Affirmed on appeal 8 P.D. 129 C.A.

THIS was an action of damage instituted on the 25th of November, 1881, on behalf of the owners of the barque *Paria* against the Russian barque *Elin*, to recover the damages sustained by the owners of the *Paria* in consequence of a collision between the two vessels in the Downs on the 21st of November, 1881. The *Elin* was arrested on the 24th of November, 1881, in the port of London, and her owners thereupon appeared as defendants, but they did not put in bail, and on the 25th of December, 1881, they admitted

(1) The gross proceeds of the sale of the *Immacolata Concerzione* had been brought into Court on the 16th of March, and amounted to 2500*l*.

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their liability for the damage proceeded for, and agreed to the usual reference to the registrar and merchants to assess the amount thereof.

On the 10th of February, 1882, on the application of the plaintiffs and with the consent of the defendants the *Elin* was sold by the marshal under an order of Court, and subsequently the net proceeds of the sale, amounting to 726*l.* 18*s.* 9*d.*, were paid into Court. On the 14th of March, 1882, the solicitors for the plaintiffs entered a caveat against payment of any money out of the proceeds of the *Elin* so paid into Court without notice to them; but after the hearing on the 2nd of May, 1881, of a salvage action against the *Elin* and her cargo, in which certain salvors had been awarded 500*l.* and costs in respect of salvage services rendered subsequently to the collision, they consented to the sum of 243*l.* 18*s.* 8*d.* (being that proportion of the award, together with taxed costs, adjudged to be borne by the *Elin*), being paid out to the solicitors for the salvors. There then remained in Court a balance of 483*l.* 0*s.* 1*d.*, and on the 23rd of June, 1882, the solicitors for the plaintiffs took out a summons calling on the defendants to shew cause why such balance should not be paid out for the use of the plaintiffs, and in support of the summons brought in an affidavit in which the managing owner of the *Paria* deposed that the damage sustained by that vessel in the collision exceeded 1200*l.*

An action of wages had on the 10th of January, 1882, been instituted against the *Elin*, on behalf of her master and crew, and the Court having on the 7th of March, 1882, pronounced that there was due to the plaintiffs in such action 123*l.* 12*s.* 1*d.* in respect of wages earned before and after the collision, for ten days' double pay and the expenses of their journey home, their solicitors subsequently gave notice of motion that the judge would be moved to order that the sum so pronounced due should be paid to them out of the proceeds of the *Elin* remaining in court.

On the 27th of June, 1882, the summons and motion came on for hearing before the judge in Court, and after some discussion counsel for the master and owners of the *Elin* abandoned so much of the motion as related to the claim of the master, and to the

claim of the crew for wages earned before the collision, and the judge with the consent of all parties ordered that a special case raising the question as to the right of the owners of the *Paria* to be paid their claim in priority to the claim of the crew of the *Elin* for their ten days' double pay, their expenses home, and their wages earned subsequently to the collision, should be stated for the opinion of the Court. A special case which, so far as material, was in the following terms was accordingly stated:—

1. On the 21st of November, 1881, the Russian barque *Elin*, when in the Downs, while on a voyage from Skelefiea to Cette, with a cargo of wood, came into collision with the English barque *Paria*, in which collision both vessels sustained damages.

2. On the same date, after the said collision, salvage services were rendered to the *Elin* by salvors, and with their assistance the *Elin* was safely brought by her own crew into the port of London, and to a discharging berth, where the discharge of her cargo, which was not completed until the 24th of December, 1881, was performed by the said crew, and a large sum for wages, which would otherwise have been paid to labourers from the shore, was saved.

3. On the 24th of November, 1881, the owners of the *Paria* commenced this action against the *Elin* and her freight to recover damages occasioned by the said collision, and the *Elin* was arrested.

4. On the 11th of January, 1882, an action for salvage was commenced on behalf of Pilcher and others for some of the services rendered as hereinbefore stated to the *Elin* and her cargo. Another action for the other services was on behalf of Buchan and others, commenced on the 28th of January; and by an order of Court, dated the 18th of February, these two actions were consolidated. On the 2nd of May, 1882, judgment was given in these consolidated actions, by which judgment the sum of 500*l.* and costs was adjudged to the plaintiffs in the said consolidated actions.

5. On the 28th of December, 1881, the owners of the *Elin* admitted liability for the damage occasioned by the said collision, and determined to abandon the voyage and not to repair the *Elin*, and the owners of cargo on board the *Elin* thereupon

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obtained their property in London from the owners of the *Elin* without paying any freight, except an advance paid to the master at the port of loading on giving bail to answer the claim in the consolidated salvage action. The cargo was discharged by the crew of the *Elin*, as previously stated.

6. On the 19th of January, 1882, an action (1882, K. No. 61) was commenced in the Admiralty Division of the High Court of Justice on behalf of the master and crew of the *Elin* against the *Elin* and her freight for wages from the month of May, 1881, to the 16th of January, 1882, on which date all these plaintiffs, except the master, were dismissed from the ship, and up to which date all these plaintiffs, except the master, had remained in the service of the ship. These plaintiffs also claimed ten days' double pay and the expenses of their journey home.

7. On the 7th of February, 1882, the owners of the *Paria* applied for and obtained an order for the sale of the *Elin*, and the *Elin* was subsequently sold by the marshal after her cargo had been discharged as aforesaid, and the full proceeds were paid into Court.

8. On the 7th of March, 1882, the plaintiffs in the wages action, other than the master, obtained judgment for their wages, and ten days' double pay and their expenses home, and the plaintiff, the master, obtained judgment for the expenses of his return home, his wages having been by special agreement made payable only out of freight earned.

9. The salvors have received their salvage so far as it was adjudged against the *Elin* out of the fund paid into Court as stated in paragraph 7, and the balance is insufficient to satisfy the claims of the *Paria* and of the crew.

10. On the 27th of June, 1882, a summons on behalf of the plaintiffs in this action asking for payment of their claim out of the fund in Court came on and was adjourned into Court. On the same day a motion made by the plaintiffs in the wages action for payment of their claim out of the fund in Court also came on, and the plaintiffs in the wages action abandoning the claim of the master to be paid in priority to the plaintiffs in this action, and the claim of the seamen to be paid their wages earned before the date of the collision in like priority to the plaintiffs in this

action, but insisting upon their claim to be paid all the subsequently earned wages, ten days' double pay, and expenses home of the crew in priority to the plaintiffs in this action, an order was made on the adjourned summons and motion that a special case should be stated in this action as between the plaintiffs in this action and the plaintiffs the crew in the wages action for determining their respective priorities.

The questions for the decision of the Court are: 1. Whether the owners of the *Paria* are entitled to have their claim satisfied out of the balance of the said fund in Court in priority to the wages of the crew of the *Elin* earned subsequently to the date of the collision, their ten days' double pay, and their expenses home, or in priority to any and which of these sums. 2. How the costs of and incidental to this special case are to be borne.

July 25. The special case came on for argument.

Stokes, for the owners of the *Paria*. The question of priority raised in this case has already been decided in favour of the damage claimant. It was so decided by Dr. Lushington in the cases of *The Chimœra* (1) in 1853, and of *The Linda Flor* (2), in 1857, and by the then judge of the Irish Court of Admiralty in the subsequent case of *The Duna* (3) in 1861. There can be no doubt that in all these three cases priority, over a person who had obtained a decree for damage done in a collision, was claimed in vain for wages earned subsequently to the collision, whilst in the two cases last mentioned the material facts as reported are almost identical with those in the present case. Moreover, even if the question here had not been covered by express decision no satisfactory reason could be given for ranking the lien ex contractu of a seaman for his wages above the lien ex delicto which exists in respect of damage, inasmuch as maritime liens ex delicto stand on a very different footing to maritime liens ex contractu: *The Benares* (4). The rule of law as to the ranking of maritime

(1) Not reported.

(2) Swab. 309; see also 6 W. R. 197, where the facts of the case are more fully reported.

(3) 5 L. T. (N.S.) 217; 6 Irish Jur. (N.S.) 358.

(4) 7 N. of C. Sup. l.; see Abbott's Law of Merchant Shipping, ed. 1881, p. 597.

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liens in inverse ratio to their attachment on the res does not ordinarily apply in the cases, where of two competing liens one lien is ex delicto and the other ex contractu. Thus the lien of the successful suitor in a damage action has been held, to the extent of the value of the wrong doing vessel at the time of the collision, to be paramount to the claim of a bottomry bondholder who has lent money for the repair of the vessel since the collision: *The Aline.* (1) The reasoning of the decision in *The Linda Flor* (2) would apply even if the crew of the *Elin* could have claimed as salvors against their own vessel, but there is no pretence for asserting that the services rendered by them after the collision were other than the ordinary services they had contracted to render.

W. G. F. Phillimore and *L. P. Beaufort,* for the crew of the *Elin.* This case is not concluded by the decision in *The Linda Flor* (2), for although in that case part of the claim of the crew of the wrongdoing vessel was in respect of wages earned subsequently to the collision it does not appear that the point was ever argued that the wages so subsequently earned were entitled to any greater priority than wages earned previously to the collision. It is settled law that the rights of a person in possession of a decree in an action of damage are merely co-extensive with the rights of the owner of the vessel against which the decree has been awarded: *The Aline* (1), *The Bold Buccleugh* (3), and it must follow as a consequence that as the interest of an owner in his vessel is subject to the claims of the seamen for their wages, so the interest accruing to the successful suitor for damage must be equally subject to such claims. Where salvage services have been rendered to a vessel to which a damage lien has attached, the salvor has a paramount right to be paid his salvage before the lien ex delicto is satisfied: *The Cargo ex Galam* (4), *The Attorney General* v. *Norstedt* (5), and there is authority for the proposition that wages earned as in this case by bringing a vessel in safety to this country after salvage services have been rendered by salvors rank above the claims of the salvors: *The Madonna d'Idra* (6);

(1) 1 Wm. Rob. 111.
(2) Swab. 309.
(3) 7 Moo. P. C. C. 267.
(4) Br. & L. 181.
(5) 3 Price, 97.
(6) 1 Dod. 37.

The Selina. (1) How then can the lien for wages so earned be postponed to the lien for damage? The decision in *The Linda Flor* (2) is in great measure founded on the assumption that the crew of a wrongdoing vessel are themselves wrongdoers, but the fact that a vessel is to blame for a collision does not as a matter of law make the crew of that vessel collectively guilty of negligence.

Stokes, in reply.

Cur. adv. vult.

Aug. 1. SIR ROBERT PHILLIMORE. This is a special case stated in order to obtain a decision between two competing maritime liens on the proceeds of a vessel sold by the marshal of this Court. The facts are shortly as follows:—The Russian barque *Elin* came into collision with the English barque *Paria* in November last, and both vessels sustained injury. After the collision salvage services were rendered to the *Elin,* and she was safely brought into the port of London by her own crew with the assistance of the salvors. Shortly afterwards four actions were brought against the *Elin,* the first by the owners of the *Paria* for damage caused by the collision, the second and third, which were consolidated, by two sets of salvors respectively, and the fourth by her own master and crew for wages earned both before and after the collision, for ten days' double pay, and the expenses of their journey home. In the first action the owners of the *Elin* admitted liability for the damages proceeded for, and the vessel was on the application of the owners of the *Paria* sold by the marshal and the proceeds paid into Court. In the consolidated salvage actions judgment was given against the *Elin,* and the amount has been paid out of the aforesaid proceeds of sale. In the action of wages, the crew obtained judgment for their wages and ten days' double pay and their expenses home, and the master obtained judgment for his expenses home only. The proceeds of sale are insufficient to satisfy the amounts awarded by the Court both to the owners of the *Paria* and to the master and crew of the *Elin.* It is admitted that the claim of the *Paria* takes precedence over the claim of the master and also over that of the crew so far as regards wages

(1) 2 N. of C. 18. (2) Swab. 309.

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earned before the collision; but a question has been raised as to whether the owners of the *Paria* can demand priority over the wages earned by the crew after the collision, the ten days' double pay due to them, and the expenses of their journey home. It is to decide this point that the special case has been stated in which it is agreed that the questions for the decision of the Court are, first, whether the owners of the *Paria* are entitled to have their claim satisfied out of the balance of the said fund in Court in priority to the wages of the crew of the *Elin* earned subsequently to the date of the collision, their ten days' double pay, and their expenses home, or in priority to any and which of these sums; secondly, how the costs of and incidental to this case are to be borne. Various decisions were cited to me as bearing upon the subject; some of them relate to questions of civil contracts such as bottomry, and not to liabilities arising out of a delictum such as damage occasioned by a collision. But there is one case which seems to me directly in point, and the authority of which is binding upon me, that is the case of the *Linda Flor*, decided by Doctor Lushington after careful consideration in 1857, and reported by Dr. Tristram in the sixth volume of the Weekly Reporter, p. 197, and in Swabey's Reports, p. 309. In that case the facts were very similar to those of the present case, priority for wages earned both before and after the collision being claimed over damages occasioned by the collision. In that case Dr. Lushington said: "This is a foreign vessel proceeded against in a cause of damage and condemned to pay that damage. The master and crew have commenced proceedings for their wages, the owner of the vessel and cargo receiving the damage object because the proceeds are insufficient to satisfy all the claims, and therefore the consequence would be, that those who have suffered from a wrongdoing would recover less than their loss. The same question was agitated in the case of *The Chimœra* (1), and I was then of opinion that the mariner could not maintain his claim to the prejudice of the parties damnified by the collision. I adhere to this opinion, and I do so especially for the following reasons: that by the maritime law of all the principal maritime states the mariner has a lien on the ship for his wages against the owner of

(1) Not reported.

that ship; that he has also a right of suing the owner for wages due to him; that some uncertainty may exist as to the mariner's lien when in competition with other liens or claims, and amongst these I might instance the case of a ship in the yard of a shipwright. In such a case I should have no difficulty in saying that the lien of the shipwright would be superior to the lien of the mariner. That in the case of a foreign ship doing damage and proceeded against in a foreign Court the injured party has no means of obtaining relief, save by proceeding against the ship itself, and that I apprehend is one of the most cogent reasons for all our proceedings in rem. That in a case where the proceeds of a ship are insufficient to compensate for damage done, to allow the mariner to take precedence of those who have suffered damage would be to exonerate so far the owner of the ship, to whom the damage is imputed, at the expense of the injured party—the wrongdoer at the expense of him to whom wrong has been done. Then, as to the mariner, what is the hardship to which he is exposed? It is true he is debarred from proceeding against the ship, but his right to sue the owner remains unaffected. It is, however, not to be forgotten that in all these cases of damage, or nearly all, the cause of the damage is the misconduct of some of the persons composing the crew; this is not the case of a bankrupt owner; it will be time to consider such case when it arises." (1) The authority of this case has never been questioned, and has always been treated as undoubted law.

In *The Duna* (2), a case decided in the Irish Admiralty Court in 1861, *The Linda Flor* (3) was followed, and an elaborate judgment was delivered, in which the principles on which that decision rested were fully set forth, and the distinction was pointed out between an obligation ex contractu, which is the basis of an action for wages, and an obligation ex delicto, upon which the liability for damage is founded. I observe that in last year's edition of Maude and Pollock's Law of Merchant Shipping the decision in *The Linda Flor* (3) is quoted and treated as settled law.

The question, therefore, is not res integra, and it is not my duty to consider whether, if it were so, the priority of the seamen's

(1) 6 Weekly Reporter, 197. (2) 5 L. T. 117.

(3) Swab. 309.

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lien ought to be established. I consider myself bound by the decision of *The Linda Flor* (1), and I decide on all the points raised in the special case in favour of the owners of the *Paria*. I shall leave each party to bear their costs of the special case. (2)

Solicitors for the owners of the *Paria*: *Stokes & Co.*

Solicitor for the master and crew of the *Elin*: *R. Greening.*

G. B.

Dec. 19.

THE FAIRPORT.

Master's Disbursements—The Admiralty Court Act, 1861 (24 *Vict. c.* 10), *s.* 10 *—Liability in respect of Judgment recovered in action on Bill of Exchange drawn by Master and dishonoured—Maritime Lien.*

In April and May, 1880, the master of a steamship obtained at a British colonial port coals for the ship, and paid for them by bills of exchange drawn on the charterers of the ship. The bills were dishonoured by the charterers, and in August, 1880, the master was served with a writ in an action brought to recover the amount of the bills. Judgment in this action was recovered against the master in July, 1881. In October, 1881, the steamship was sold, and the master in November, 1882, instituted an action of disbursements against her and her freight. The purchasers appeared and put in bail. At the hearing of the action the judgment recovered against the plaintiff in August, 1881, remained still in force and unsatisfied, and the plaintiff claimed to recover as a disbursement the amount for which he was liable under it:—

Held, that the liability of the plaintiff to satisfy the judgment against him must be considered as a disbursement in respect of which a maritime lien existed under the 10th section of the Admiralty Court Act, 1861:

Held, also, that the right to enforce such lien had not been lost by any want of reasonable diligence on the part of the plaintiff, and that his claim must be pronounced for.

THIS was an action of disbursements instituted on the 23rd of November, 1881, on behalf of Steward Dargie, late master of the

(1) Swab. 309.

(2) The following minute of the judgment was entered in the registry: The judge having maturely deliberated, pronounced that the plaintiffs under the circumstances set forth in the special case filed in the action are entitled to have their claim for damage by collision satisfied out of the balance of the proceeds of the vessel *Elin* now remaining in Court in priority to the wages of the crew of the said vessel earned subsequently to the date of the said collision, and he directed the sum of 483*l.* 0*s.* 1*d.*, the said balance now remaining in Court, to be paid out to the solicitors of the plaintiffs for their use and benefit in part satisfaction of their claim accordingly, but left each party to bear their own costs of and relating to the special case.

steamship *Fairport*, against the *Fairport* and her freight. The indorsement on the writ stated that the plaintiff's claim was "for disbursements made during the time he was master of the *Fairport*," and that he claimed 300*l.* inclusive of costs. The vessel was arrested in the action, but was released by consent, on an undertaking on behalf of Messrs. Wallace & Co., the owners of the *Fairport*, to appear and put in bail; and on the 24th of November, 1881, Messrs. Wallace & Co. entered an appearance as defendants.

No statement of claim was delivered, and the defendants in their statement of defence admitted that the plaintiff was at some time prior to the 4th of October, 1881, master of the *Fairport*, but alleged in the first and second paragraphs thereof that whilst the plaintiff was master the owners of the *Fairport* were G. P. Roy, P. S. Roy, and J. S. Roy; that the defendants, on the 14th of October, 1881, purchased for valuable consideration sixty-four sixty-fourth shares of the *Fairport* from the said G. P. Roy, P. S. Roy, and J. S. Roy; that the said shares were transferred to the defendants on the same date by bills of sale according to the provisions of the Merchant Shipping Acts; and that the defendants were afterwards duly registered as the owners of the *Fairport*, and at the date of the delivery of the statement of defence were such owners. After these allegations the statement of defence concluded by alleging that the disbursements, if any, made by the plaintiff were made before, and the plaintiff ceased to be the master of the *Fairport*, before the purchase of the *Fairport* by the defendants; that the plaintiff never made such disbursements as were claimed; and that if such disbursements were ever made the plaintiff had been repaid and reimbursed them all.

On or about the 27th of November, 1882, the solicitor for the defendants took out a commission for bail, and on the 29th of November a bail bond to the amount of 300*l.* was signed before the commissioner. The usual notice of bail was then served on the plaintiff's solicitors, and on the 30th of November, the day on which the action was called on for hearing, the commission and bail papers, including the affidavits of justification of the sureties were filed by the defendants' solicitor in the registry.

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1882. Nov. 30; Dec. 2. The action was heard.

The plaintiff was called as a witness and examined. The result of his evidence and of the evidence of two other witnesses called in support of his claim can be gathered from the judgment. It is sufficient to state here that it appeared from their evidence that the allegations in the 1st and 2nd paragraphs of the statement of defence were true, and that the plaintiff sought to recover, not sums of money actually advanced or expended for the use of the *Fairport*, but the amount of a judgment for 105*l.* 0*s.* 8*d.*, together with costs, which was still in force and unsatisfied, and had been recovered against him in August, 1881, in an action on two bills of exchange, drawn by him, when master of the *Fairport*, in April and May, 1880, at Gibraltar, for the purpose of obtaining coals for the use of his vessel at that port, and shortly afterwards dishonoured.

On behalf of the defendants, Mr. J. J. Wallace, one of the members of the firm of Messrs. Wallace & Co., was examined on the question whether at the time of the purchase of the *Fairport* he was aware of the liability the plaintiff had incurred by drawing the above-mentioned bills of exchange.

J. G. Barnes, for the plaintiff. The plaintiff's claim is "a claim for disbursements" within the meaning of the 10th section of the Admiralty Court Act, 1861: *The Feronia* (1); *The Red Rose* (2); *The Marco Polo.* (3) And it is settled law that in the case of claims within that section a maritime lien attaches upon ship and freight: *The Mary Ann.* (4) The plaintiff, therefore, had a maritime lien upon the *Fairport* and her freight until she was released under an undertaking to put in bail, and on bail being put in he became entitled to judgment against the defendants, and against the bail, for the amount of his claim. The cases of *The Chieftain* (5) and *The Edwin* (6) will be relied on for the defendants, but these cases are not only overruled by the decisions of the Court of Appeal in *The Limerick* (7) and *In re Rio Grande do Sul Steamship Co.* (8), but were decided without reference

(1) Law Rep. 2 A. & E. 65.
(2) Law Rep. 2 A. & E. 80.
(3) 1 Asp. Mar. L. C. (N.S.) 54.
(4) Law Rep. 1 A. & E. 8.
(5) Br. & L. 104.
(6) Br. & L. 281.
(7) 1 P. D. 411.
(8) 5 Ch. D. 282.

to the practice of this Court and of the Court of Admiralty, whereby a master in a contested case is precluded from recovering in respect of liabilities incurred for the benefit of the ship until after vouchers, shewing that the items of the claim have actually been paid by him, have been produced in the registry: Maude & Pollock, Merchant Shipping, 4th ed. p. 124. In fact the Court may exercise the jurisdiction given by the 10th section of the Admiralty Court Act, 1861, in any action of disbursements, provided it can be shewn at any time before the conclusion of the suit, that the items of the plaintiff's claim have been actually disbursed by him: *The Feronia* (1); *The Red Rose* (2); *The Marco Polo* (3); *The Limerick.* (4) Lastly, the plaintiff has not been guilty of any laches which would disentitle him to the aid of the Court in enforcing his claim against the defendants and the bail: *The Charles Amelia* (5); *The Europa* (6); *The Bold Buccleuch* (7); *The Nymph.* (8)

W. G. F. Phillimore, for the defendants. No doubt the Court of Admiralty held in *The Mary Ann* (9) that the 10th section of the Admiralty Court Act, 1861, had given the master a maritime lien for money actually expended for the use of his ship, but the authority of that case is shaken by the subsequent decisions of the Judicial Committee of the Privy Council in *The Two Ellens* (10) and *The Pieve Superiore* (11), where it was held that under the provisions of the Admiralty Court Act, 1861, a statutory right to proceed in rem might exist without the suitor having a maritime lien.

[SIR ROBERT PHILLIMORE. I shall not depart from the decision in *The Mary Ann.* (9)]

Even assuming the *Mary Ann* to have been rightly decided, there can be no maritime lien in respect of a mere liability to pay money. It was so decided and rightly decided in *The Edwin* (12), and in *The Chieftain* (13), for the more recent cases of *The*

(1) Law Rep. 2 A. & E. 65.
(2) Law Rep. 2 A. & E. 80.
(3) 1 Asp. Mar. L. C. (N.S.) 54.
(4) 1 P. D. 292.
(5) Law Rep. 2 A. & E. 330.
(6) Br. & L. 89.
(7) 7 Moo. P. C. C. 267.
(8) Swab. 86.
(9) Law Rep. 1 A. & E. 8.
(10) Law Rep. 4 P. C. 161.
(11) Law Rep. 5 P. C. 482.
(12) Br. & L. 281.
(13) Br. & L. 104.

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Feronia (1), and *The Red Rose* (2), are to be explained by the circumstance that there was in Court freight on which the master had an equitable lien. In *The Marco Polo* (3), the Court of Admiralty followed the *Feronia* (1), and in the cases of *The Limerick* (4), and the *In re Rio Grande do Sul Steamship Co.* (5) before the Court of Appeal, the question whether liabilities could constitute disbursements, does not appear to have been raised in argument. The plaintiff could and ought to have brought the present action, if not so soon as he knew the bills were dishonoured, at least as soon as proceedings to recover the amount due on them were taken against him. Not having so done, he has been guilty of laches within the cases cited on the point.

Barnes, in reply.

Cur. adv. vult.

Dec. 12. SIR ROBERT PHILLIMORE. This is an action in which the plaintiff, who was formerly master of the steamship *Fairport*, seeks to recover a sum of money for which he has become liable, on two bills of exchange drawn by him whilst he was master, in order to provide necessaries for the vessel. The *Fairport* was owned by Messrs. Roy & Sons, of Arbroath, in Scotland. In the spring of 1880, she was chartered by Messrs. Lunham & Co. of London, and sent to the Mediterranean with the plaintiff as master. On the 12th of April, 1880, the plaintiff obtained coals at Gibraltar for the use of his vessel, and paid for them by drawing a bill for 40*l.* 14*s.* on Lunham & Co. He did this in accordance with his previous practice on similar occasions and in obedience to instructions received from the charterers and confirmed by Messrs. Roy & Sons, the owners of the vessel. On his return voyage, on the 4th of May, 1880, he obtained a further supply of coals and other necessaries at Gibraltar, paying for them as before by a bill which he drew on Messrs. Lunham & Co., for 58*l.* 18*s.* These two bills came into the hands of a Mr. De Mattos, who is still the holder of them. The first bill was accepted by Lunham & Co., the second was not, and Lunham & Co. having

(1) Law Rep. 2 A. & E. 65.
(2) Law Rep. 2 A. & E. 80.
(3) 1 Asp. Mar. L. C. (N.S.) 54.
(4) 1 P. D. 411.
(5) 5 Ch. D. 282.

shortly afterwards become insolvent, neither of them was met at maturity, nor have they been subsequently met.

Mr. De Mattos as holder of the dishonoured bills served a writ on the plaintiff as drawer, in August, 1880, and obtained judgment against him in July, 1881, for 113*l.* 8*s.* 10*d.*, being the amount of the two bills and costs. This sum has not yet been paid.

In October, 1881, Messrs. Wallace & Co., the defendants in this action, bought the *Fairport* from Roy & Sons; and in the following November, the plaintiff began the present action in rem to recover the above-mentioned sum of 113*l.* 8*s.* 10*d.* with costs.

A writ in rem was issued in this Court, and the vessel has been arrested. The defence raised by Messrs. Wallace & Co., the present owners, is reducible to the three following propositions: two of law, one of mixed law and fact. The two propositions of law are:

1. That a master's disbursement does not constitute a maritime lien.

2. That even if it does the subject of the present action is a liability and not properly a disbursement, the plaintiff as yet having actually paid nothing; and that a mere liability cannot create a maritime lien.

3. The proposition of mixed law and fact is that if there were a maritime lien the plaintiff is precluded by his own laches from enforcing it against a bonâ fide purchaser for value.

The law as to the first proposition appears to me to be laid down correctly in the judgment of Dr. Lushington in *The Mary Ann* (1), which expressly decides that since the passing of the 10th section of the Admiralty Court Act, 1861, a master has a maritime lien for his disbursements. I followed this decision in *The Feronia* (2), and I may observe also, that it is treated as settled law in the last edition of Maude & Pollock's Merchant Shipping, vol. i. pp. 86 and 125.

The second proposition depends upon the true construction of these words in the before-mentioned 10th section of the Admiralty Court Act, 1861, "any claim for disbursements made by him;"

(1) Law Rep. 1 A. & E. 8. (2) Law Rep. 2 A. & E. 65.

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and the cases of *The Chieftain* in 1863 (1), and *The Edwin* in 1864 (2), were cited by the defendants' counsel in support of his contention that "disbursements" must mean money actually paid by the master and cannot be applied to a mere liability created as in the present case, by a bill of exchange drawn by him and afterwards dishonoured. Both those cases were carefully considered in the judgment of *The Feronia* in 1864 (3), in which case, I held that money earned as freight having been paid into Court, the liabilities incurred by the master for the benefit of the ship were to be considered as disbursements, and to be discharged out of the fund in Court. In the present case, there is no freight paid into Court, but yet the Court has its hand upon the res (4), and ought not to part with it in my opinion, until justice is done to all parties.

The judgment in *The Feronia* (3) was followed in a subsequent judgment which I delivered in *The Marco Polo* in 1871 (5), and was mentioned without disapprobation in the case of *In re Rio Grande do Sul Steamship Co.* (6) I must also refer to the report of the registrar in the case of *The Red Rose* (7) which is printed at the end of the case of *The Feronia* (3), and which is stated in the judgment in that case to have been approved by Dr. Lushington.

Upon the whole, I think that any doubt that may have arisen from the decisions in *The Chieftain* (1) and *The Edwin* (2) must be holden to be now set at rest, and that the law is correctly laid down in *The Feronia.* (3) The conclusion at which I arrive is that the liability which the plaintiff has incurred for the use of the ship is a disbursement within the meaning of s. 10 of the Admiralty Court Act, 1861, and that he is entitled to a maritime lien on the ship.

It remains to consider the question of laches. The law on this subject is established by the cases of *The Bold Buccleuch* in 1850 (8), and *The Europa* in 1863. (9) It results from these cases that a maritime lien is not indelible, and may be lost by negli-

(1) Br. & L. 104.
(2) Br. & L. 281.
(3) Law Rep. 2 A. & E. 65.
(4) See *The Kalamazoo*, 15 Jur. 886.
(5) 1 Asp. Mar. L. C. (N.S.) 54.
(6) 5 Ch. D. 282.
(7) Law Rep. 2 A. & E. 80.
(8) 7 Moo. P. C. C. 267.
(9) Br. & L. 89.

gence or delay where the rights of third parties may be compromised, but where reasonable diligence is used and the proceedings are had in good faith, the lien travels with the thing into whatsoever possession it may come. What constitutes reasonable diligence must depend upon the particular circumstances of each case. In the present case I hold that it is proved that until judgment was actually obtained against the plaintiff (who by the way was continually at sea), he believed, and not unreasonably so, that his liability would not become absolute, and that Messrs. Roy & Sons, his previous employers, would protect him from having to meet the bills himself. I am of opinion that he cannot fairly be charged with such want of diligence as would forfeit his lien.

If it were necessary to decide whether the defendant, Mr. J. J. Wallace, was, as a matter of fact, aware of the liability attaching to the ship when she was bought by his firm, I should be inclined to believe the positive evidence of Mr. Breslauer, one of the witnesses called on behalf of the plaintiff, on the subject, in preference to that of Mr. Wallace, who could only speak to his want of recollection of the alleged conversations.

I pronounce for the plaintiff's claim.

On the 19th of December last, counsel on behalf of the plaintiff moved the judge in Court to direct that the defendants should be ordered to put in sufficient bail. The application was opposed by counsel on behalf of the defendants, and the judge directed that the sureties mentioned in the commission filed by the defendants' solicitor on the 30th of November, as above mentioned, should attend before the registrar to be cross-examined on their respective affidavits of justification.

Solicitors for plaintiff: *Ingledew & Ince.*

Solicitor for defendants: *W. Batham.*

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Breach of towage Contract—Condition exempting from Liability in respect of Damage arising from Negligence of Tug-owners or their Servants—Infringement of Harbour Regulations—Harbours, Docks, and Piers Clauses Act, 1847 (10 *Vict. c.* 27), *s.* 52—*Great Yarmouth Port and Haven Act*, 1866 (29 & 30 *Vict. c. ccxlvii.*), *s.* 3.

The master of a steam tug, who had contracted to tow a fishing smack out of the harbour of Great Yarmouth to sea on the terms that his owners should not be liable for damage arising from any negligence or default of themselves or their servants, after the towage had been in part performed, took in tow in addition to the smack six other vessels, and in consequence was unable to keep the fishing smack in her course, so that she went aground and was lost. By having more than six vessels in tow at once the master of the tug disobeyed a regulation made by the harbour master of Great Yarmouth under statutory authority. The owners of the fishing smack brought an action against the owners of the steam tug to recover damages:—

Held, that the loss of the smack was occasioned by the negligence of the master of the tug; that the defendants were protected from liability by the terms of the towage contract, and that the action must be dismissed.

Affirmed on appeal (9 P.D. 3. C.A.

This was an action in personam brought by the owner of the fishing smack *Red Rose*, against the Great Yarmouth Steam-tug Company, to recover the damage occasioned by the wreck and loss of the *Red Rose* in the harbour of Great Yarmouth on the 2nd of November, 1881, when that vessel was in tow of the steam tug *United Service* belonging to the defendants.

The statement of claim, after stating that on the afternoon of the 2nd of November, 1881, the master of the *United Service*, then lying at the quay at Great Yarmouth alongside of the brigantine *Hannah*, had been requested by the plaintiff to take the *Red Rose* in tow and tow her to sea; and that shortly afterwards the *United Service* had come down the river and harbour at Yarmouth towing the *Hannah* to sea, and after sending a line on board the *Red Rose*, and making fast that vessel's tow rope on board, had proceeded to tow her and the *Hannah* side by side, continued in the 4th and following paragraphs in substance as follows:—

4. This is the ordinary way in which contracts for towage to sea are made by the defendants' servants on their behalf. In the absence of mention of any special sum there is a usual towage

price, which the owner of the towed vessel thereby binds himself to pay, and the servants of the defendants shew that they undertake the towage by sending their line on board the vessel to be towed.

5. Shortly after the *Red Rose* had been thus taken in tow two other vessels were taken in tow by the *United Service*, and were towed side by side, astern of the *Hannah* and the *Red Rose*.

6. The wind was from about south by east half east, blowing strong into the entrance of the river, and the tide was flood. In these circumstances the *United Service* had not, though her engines and machinery were in good order, power enough to tow more than the vessels she had in tow. The plaintiff entered into the contract for the towage of the *Red Rose*, relying upon the *United Service* not taking in tow, upon this occasion, more vessels than she had power to tow. Notwithstanding this, the *United Service* proceeded to take in tow, besides the four vessels already mentioned, two other vessels, which were arranged side by side behind the two previous vessels, and finally a seventh vessel.

7. This seventh vessel was taken in tow in breach of one of the directions or regulations duly given or made by the harbour master or pier master, under the Harbours, Docks, and Piers Clauses Act, 1847, and the Special Act, the Great Yarmouth Port and Haven Act, 1866. Such direction or regulation is as follows: —"No steam vessel used for the purpose of towing vessels shall, at any one and the same time, tow, or have in tow, or aid or assist in towing, more than six vessels, and such vessels in tow shall not, at any time, exceed more than two vessels abreast." Public notice is given of these directions and regulations, which are well known to the plaintiff and to the defendants, and to shipowners at Great Yarmouth generally, and were binding upon the defendants and their servants.

8. As the vessels approached the mouth of the harbour the wind and tide and the sea meeting them proved too strong for the *United Service* with so many vessels in tow, and she was unable to make head against the wind, tide, and sea, by reason of the number of the vessels in tow, and several of the vessels in tow, including the *Red Rose*, were carried out of their course on to the north shore and took the ground, and the *Red Rose* in particular

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so took the ground that she could not be got off, and became a total wreck, and was lost.

9. The master of the *United Service*, in taking and keeping so many vessels in tow, disobeyed the directions of the harbour master and pier master, and did not regulate his vessels according to the directions of the harbour master and pier master, made in conformity with the Harbours, Docks, and Piers Clauses Act, 1847, and the Special Act, forasmuch as he did not obey the directions and regulations mentioned in paragraph 7, which had been duly served upon him, or of which he had notice; and further, forasmuch as he disobeyed or neglected to comply with the oral directions of the harbour master and pier master, directing him that he had too many vessels in tow, and requiring him to leave some of them at the pier and tow them out afterwards.

11. The defendants rely upon the following notice given by them:

"Notice to Shipowners, Fishing boat owners, Shipmasters, and others. The Great Yarmouth Steam-tug Company, Limited, owners of steam-tugs *Victoria*, *United Service*, *Express*, *Meteor*, *Sailor*, *Star*, *Pilot*, and *Andrew Woodhouse*,

"Respectfully give notice that they will tow vessels, boats, or other crafts by the above-named steam-tugs on the following conditions only:

"That they are not to be answerable or accountable for any loss or damage whatever which may happen to or be occasioned by any vessel, boat, or craft, or any of the cargoes on board of the same while such vessel, boat or craft is in tow of either of the steam-tugs in the river or at sea, and whether arising from or occasioned by any supposed negligence or default of them or their servants, or defects or imperfections in the said steam-tugs or either of them, or the machinery or any other part of the same, or any delay, stoppage, or slackness of the speed of the same, however occasioned or for what purpose wheresoever taking place, and that the owner or persons interested in the vessels, boats, or crafts, or of the cargoes on board the same so towing, undertake, bear, satisfy, and indemnify the said tug owners against the same."

12. The plaintiff admits the receipt of this notice, and admits that it formed part of the contract between him and the defendants, but he says that the defendants are not protected against his claim by the terms of this notice.

13. The plaintiff says that there was an implied contract in law that the *United Service* would not undertake a work beyond her power to perform, and a further implied contract in law that she would not act unlawfully or in disobedience of the above-mentioned printed or written and oral directions and regulations to the detriment of the plaintiff, and a further implied contract that her master would regulate his vessel in accordance with the directions of the pier master or harbour master.

14. The plaintiff further maintains that the breach of duty or misconduct of the master of the *United Service* in taking an excessive number of vessels in tow was not one of the matters excepted by the said notice.

The defendants delivered a statement of defence which contained the following material allegations:—

With reference to the 6th paragraph of the statement of claim, the defendants deny that in the circumstances therein stated the *United Service* had not power enough to tow more than the vessels which she then had in tow. On the contrary, the *United Service* had power enough to tow all the vessels which she took in tow.

With reference to the 7th paragraph of the statement of claim, the defendants deny that the said seventh vessel was taken in tow in breach of the said by-law or regulation. They deny that the said by-laws or regulations were duly made by the authorities of the harbour, or that the same were made under the Harbours, Docks, and Piers Clauses Act, 1847, and they deny that such by-law or regulation was in the words or to the effect set forth in the said 7th paragraph. The defendants further say that the said by-law or regulation was ultra vires and invalid, and was not binding upon the defendants or their servants.

Even if the defendants were guilty of the alleged breach of the said by-law, and injury to the *Red Rose* resulted from the alleged breach, nevertheless no cause of action thereby accrued to the plaintiff, nor did he become entitled thereby to maintain this

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action against the defendants to recover damages for an injury resulting from such alleged breach of the said by-law.

The alleged injury to the *Red Rose* was not the consequence of the alleged breach of the said by-law, nor was the same caused by the *United Service* taking in tow more than six vessels.

With reference to the 8th paragraph of the amended statement of claim, the defendants say that the inability of the *United Service* to make head against the wind, tide, and sea was not caused by the number of the vessels in tow, or by any negligent act or omission on the part of the defendants or their servants.

With reference to the 9th paragraph of the statement of claim, the defendants deny that the master of the *United Service* disobeyed any verbal directions of the harbour master or pier master, or that the master failed to regulate his vessel according to the directions mentioned in the said paragraph. Even if the master of the *United Service* did disobey the said verbal directions of the harbour master or pier master, nevertheless no cause of action accrued thereby to the plaintiff, nor did he become thereby entitled to maintain this action against the defendants to recover damages for an injury resulting from such alleged disobedience of such directions.

With reference to the 11th and 12th paragraphs of the statement of claim, the defendants rely on the said notice as forming part of the contract between the plaintiff and the defendants, and repeat the same, and plead it as a defence to all the matters and causes of action set forth and alleged in the statement of claim, and say that the defendants are, by the terms of such notice, protected against the claim of the plaintiff.

With reference to the 13th paragraph of the statement of claim, the defendants say that there was no implied contract in law that the *United Service* would not act in disobedience of the said directions and regulations to the detriment of the plaintiff, and that there was no implied contract in law that the master would regulate his vessel in accordance with the directions of the pier master or harbour master.

With reference to the 14th paragraph of the statement of claim, the defendants say that the breach of duty or misconduct of the master of the *United Service* (if any such were committed) in

taking more than six vessels in tow was one of the matters excepted by the notice set out in the 11th paragraph of the statement of claim.

The plaintiff replied, joining issue upon the allegations in the statement of defence, and claiming the same benefit as if he had demurred to the same.

Jan. 15. The action came on for hearing before the judge assisted by two of the Elder Brethren of the Trinity House.

R. E. Webster, Q.C., Charles Hall, Q.C., and *J. G. Witt*, for the defendants, moved the Court for judgment on the admissions of fact appearing on the pleadings. Assuming the loss sued for in this case to have been caused by the master of the steam tug having disobeyed the directions of the harbour master, the defendants are relieved from liability by the terms of the notice which admittedly formed part of their contract with the plaintiff, and by which, as they legally might, they have in the widest terms exempted themselves from all liability for the negligence of themselves and their servants, whether such negligence be the breach of an implied warranty or not: *Symonds* v. *Pain* (1); *Peninsular and Oriental Steam Navigation Co.* v. *Shand* (2); *Taubman* v. *Pacific Steam Navigation Co.* (3) The non-compliance with a rule made under statutory authority is nothing more than evidence of negligence: *Atkinson* v. *Newcastle and Gateshead Waterworks Co.* (4); *Stevens* v. *Jeacocke.* (5) Moreover, even if the terms of the notice exempting the defendants from liability do not protect them from the consequences of the breach of an implied condition precedent, there has been no such breach in this case, for the wrongful act of the master in taking more than six vessels in tow at once was an act done after the contract had been in part performed: *Steel* v. *State Line Steamship Co.* (6)

Butt, Q.C., and *W. G. F. Phillimore*, for the plaintiff. On entering into the contract in this case the defendants impliedly

(1) 30 L. J. (Ex.) 256.
(2) 3 Moo. P. C. C. (N.S.) 272.
(3) 1 Asp. Mar. Law Cases (N.S.) 336.
(4) 2 Ex. D. 441.
(5) 11 Q. B. 731.
(6) 3 App. Cas. 72.

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warranted that the tug was fit to commence and conclude the towage, and that the regulations of the harbour made under the statutory powers conferred on the harbour master should not be infringed by those in charge of her. In the notice on which the defendants rely there is nothing to exempt them from liability for damages occasioned as in the present case by the breach of the implied warranties thus forming part of the contract. [In addition to the cases above cited they referred to *Taylor* v. *Caldwell.* (1)]

SIR ROBERT PHILLIMORE. My judgment will be against the plaintiff; but I will deliver a written judgment containing the reasons for the decision at which I have arrived.

Cur. adv. vult.

Jan. 23. SIR ROBERT PHILLIMORE. The question which I have now to decide is an important one, though lying within narrow limits. It arises in an action for breach of a contract brought by the owner of a smack against the owners of a steam-tug engaged to tow the smack.

The facts which I have to deal with are set forth in the allegations in the plaintiff's statement of claim. They have not been proved but are admitted as true by the defendants for the sake of argument, in order that the legal question which arises may be decided. They are shortly as follows:

On the 2nd of November, 1881, the plaintiff, who was the owner of the fishing-smack *Red Rose*, of the port and harbour of Great Yarmouth, requested the master of the steam tug *United Service*, belonging to the defendants, to tow the *Red Rose* out to sea. The *United Service* was at that time lying moored at the quay at Great Yarmouth, alongside of a brigantine called the *Hannah*, and the *Red Rose* was some little way lower down the river. In compliance with the plaintiff's request, the *United Service* being under the command of her master, a servant of the defendants, came down the river and harbour, having the *Hannah* in tow, and when alongside the *Red Rose* she made that vessel fast to herself and proceeded seawards, having the *Hannah* and the *Red Rose* both in tow, side by side.

(1) 3 B. & S. 826; 32 L. J. (Q.B.) 164.

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Shortly afterwards, two other vessels were taken in tow by the *United Service*, and were towed side by side of each other astern of the *Hannah* and the *Red Rose*. The wind at this time was blowing strongly into the entrance of the river and the tide was flood. The engines and machinery of the tug were in good order, and she appeared able to manage the four vessels which she already had in tow, but could do no more. She proceeded, however, to take in tow two other vessels besides the four already mentioned, and finally, a seventh vessel. As the vessels approached the mouth of the harbour, the wind and sea proved too strong for the tug with so many vessels in tow; the tow ropes got out of order, and ultimately the *Red Rose* was carried out of her course, took the ground so that she could not be got off, and became a total wreck. For the loss thus occasioned, the plaintiff claims damages.

The seventh vessel was taken in tow in breach of a regulation duly made by the harbour master or pier master, under the Harbours, Docks, and Piers Clauses Act, 1847, and the Special Act, the Great Yarmouth Port and Haven Act, 1866; a regulation which forbids a tug to take more than six vessels in tow at once. The master of the *United Service* moreover disobeyed certain oral directions given him by the pier master, with regard to the vessels he was towing.

Before entering into the towage contract mentioned above, the plaintiff had received the following notice issued by the defendants, which he admits formed part of the contract.

[His Lordship read the notice set out in the 11th paragraph of the statement of claim.]

The defendants rely upon this notice as protecting them against the plaintiff's claim in respect of the alleged wrongdoing of their servant the master of the *United Service*. The contention of the plaintiff is that the defendants are liable notwithstanding the notice; that it was an implied term of the contract that the master of the tug, in the first place, should obey the regulations framed under statutory authority; and, secondly, should under the general law, apart from any statutory rule, take no more vessels in tow than the tug was competent to manage; that this implied condition is in the nature of a warranty, and that a breach of it constitutes something more than the negligence against which

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the defendants are protected by this notice. According to the argument of the plaintiff's counsel, the negligence referred to in the notice is merely the ordinary negligence of a tug master during the performance of a towage contract, not a breach of a warranty implied in the contract; and that if such warranty was intended to be negatived the notice should have expressly provided for it. It appears to me, that the only point to be decided is, whether or not the words in the notice "negligence or default of their servants" cover the alleged wrongdoing of the master of the tug in disobeying the regulation made under statutory authority and the directions of the pier master, and taking in tow more vessels than his tug was competent to manage. It is important to observe that the tug is admitted to have been competent to have towed four vessels, and that at the time when the performance of the contract began, and during the first part of such performance, the tug was altogether within her rights, the alleged unlawfulness not occurring until the seventh, or at least the fifth and sixth vessels were taken in tow, when part of the contract had already been performed. Of the authorities cited, I think the case of *Steel* v. *State Line Steamship Co.* (1) is most in point. In that case a bill of lading contained a special clause which added negligence of the persons in the service of the ship to the usual excepted perils. Part of the cargo was damaged during the voyage by seawater coming in through an insufficiently secured porthole. It seems to have been considered that if the evidence had established the fact that the deficiency of the porthole had arisen during the voyage through negligence of the crew, and was not due to any defect arising before the departure of the ship from harbour, then the shipowners would have been protected by the special clauses in the bill of lading. The circumstances of the present case seem to me to be analogous. I am of opinion that the alleged wrong, as it arose entirely during the performance of the contract, was negligence and default within the meaning of the notice issued by the defendants and nothing more.

I cannot allow that the somewhat subtle distinction attempted to be drawn by the plaintiff's counsel, between negligence and

(1) 3 App. Cas. 72.

breach of a warranty impliedly contained in the contract, is to be found in the circumstances before me; nor am I able to see any material difference between the negligence of a master in breaking a rule made under statutory authority, and his negligence in breaking the general law.

On these grounds, I pronounce in favour of the defendants, and give judgment for the defendants with costs.

Judgment for the defendants.

Solicitors for plaintiff: *Ingledew & Ince.*
Solicitors for defendants: *Pritchard & Sons.*

G. B.

THE LANCASTER.

Feb. 20.

Salvage—Amount of Award.

In a most meritorious case of salvage, where a steamship which had got aground on the shore of the Red Sea, ninety-five miles from Suez, in such a position that without help she must before many hours had elapsed have been lost with all hands on board her, was towed off the shore and to within a few miles of Suez by another steamship, the Court, on a value of 62,000*l.*, awarded to the salvors 6000*l.*

THIS was an action of salvage instituted on behalf of the owners, master, and crew of the screw steamship *Ossian* against the screw steamship *Lancaster*, her cargo and freight.

The statement of claim alleged as follows:—

1. The *Ossian* is a screw steamship of about 1210 tons register, and at the time the services hereinafter stated were rendered she was on a voyage from Suez to Tuticorin in the East Indies in ballast.

2. On Tuesday, the 30th of May, 1882, at about 5 A.M., the *Ossian* was passing down the Red Sea, about ninety-five miles from Suez, and the wind was from the N. and N.W. blowing a strong breeze, with a heavy sea running and surf breaking, when those on board the *Ossian* observed the *Lancaster*, which is a screw steamer (and which the captain of the *Ossian* had learnt at Suez was in distress), aground at a point of the shore which is surrounded by coral reefs, and about five miles north of the point known as Ras Garib, and as the *Ossian* came near the *Lancaster* signalled "can you tow me off?"

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3. The *Ossian* at once made towards the *Lancaster*, and when within a short distance brought up by her starboard anchor. A boat from the *Lancaster*, with her captain in it, came alongside the *Ossian*, and it being too rough and boisterous for the *Lancaster's* captain to get on board the *Ossian*, the captain of the latter vessel managed to leap into the said boat, and it thereupon, in a heavy sea and surf and strong wind, proceeded towards the *Lancaster*, which was boarded by both captains with some difficulty.

4. The captain of the *Ossian* then ascertained as the facts were that the *Lancaster*, with a cargo of wheat from Bombay for the United Kingdom, had been ashore as above stated since the night of Saturday the 27th of May, 1882; that while so ashore she had signalled for assistance to two steamers, both of which had refused compliance with her request; that she was bumping and sliding on the rocks; that her stern post and bottom were started; she was holed, and was making water in the after hold; the after ballast tank was full of water, and she had jettisoned 300 tons of cargo.

6. The master of the *Ossian* considered it very doubtful, owing to the dangerous position of the *Lancaster* and the state of the wind and sea, whether the *Ossian* could possibly succeed in getting the *Lancaster* afloat; and the master of the *Lancaster* being anxious that the *Ossian* should not leave her side if unable to tow her off, made the following offer to the captain of the *Ossian*, which he accepted:

"Tuesday, 30th May, 1882.

"I this day offer W. Tillar, master *Ossian*, one hundred pounds per day for standing by and rendering any service I may need and as long as I may need, but not over seven days. In case the ship is got off this is to be void, and claims settled by arbitration."

7. The master of the *Ossian* then managed with much risk and difficulty to return to his vessel in the *Ossian's* lifeboat, and brought his vessel as near as he dared to the *Lancaster* in order to endeavour to tow her off the rocks. By this manœuvre the *Ossian* was necessarily brought into such dangerous proximity to numerous coral reefs that to prevent her also getting aground, which in the then condition of the wind and high sea running

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was imminently probable, he was compelled to put out two anchors to seaward. Those on board the *Ossian* then prepared to run a line on board the *Lancaster*. This, after considerable difficulty and risk, the sea still running very high and the wind being strong, they succeeded in doing and afterwards in connecting the two ships by means of the *Lancaster's* hawser.

8. The *Ossian* being then under steam attempted to move the *Lancaster*, but was obliged to increase the pressure in her boilers to upwards of 70 lbs., and after a considerable time succeeded in making the *Lancaster* move, and ultimately in getting her off the reef on which she had settled. The *Lancaster's* propeller slowly reversing, she ultimately came off and was towed into deep water by the *Ossian*. During the assistance so rendered the risk and danger to the *Ossian* was increased by her chains fouling both her anchors so laid out as aforesaid, and in addition the tow-rope got foul of the propeller, rendering it necessary for the mate of the *Ossian* to dive repeatedly in order to cut and clear the same. These operations took six hours' incessant labour on the part of a large number of the *Ossian's* officers and crew, and were effected at great jeopardy to the lives and safety of some of them. During the whole of this time, from the wind and sea prevailing, with the screw rendered useless, the *Ossian* was in great peril and risk.

9. The *Ossian* succeeded in towing off the *Lancaster* at about 4.30 on Tuesday, and then at the request of the captain of the *Lancaster* proceeded to take her in tow for the port of Suez, then ninety-five miles distant. After towing her to within a few miles of that port, there being a strong head wind and a heavy sea the hawser parted on being shortened at the request of the master of the *Lancaster*, and the *Ossian* prepared to send a fresh hawser aboard when the captain of the *Lancaster* intimated that he thought the vessel could steam without towing if the *Ossian* kept by her.

10. Owing to the damage the *Lancaster* had received while ashore she was so disabled as to make it unsafe and imprudent for her to proceed alone to Suez, and it was on this account that the master of the *Lancaster* begged those on board the *Ossian* to stand by his ship, although she was then so near to Suez, till she reached that place, so as to be ready and at hand to render such

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assistance as might be necessary. This the *Ossian* did, and the *Lancaster* going ahead dead slow reached Suez safely in company with the *Ossian* on Wednesday, the 31st of May, at about 6.15 P.M.

11. The place where the *Lancaster* went aground is one of very great peril. It is surrounded by dangerous coral reefs, and the *Lancaster*, owing to the position in which she was lying, was exposed to the full force of the wind and sea; and had not those on board the *Ossian* come to her assistance, the *Lancaster*, her crew and cargo, would probably have been destroyed and lost. As it was, when the *Lancaster* arrived at Suez, the remainder of her cargo had to be discharged, and the vessel had to undergo considerable repairs before she was able to proceed on her homeward voyage.

12. The said services were rendered with considerable skill and promptitude, and with great risk to the captain and several of the *Ossian's* crew, and the *Ossian* was exposed to very great risk and damage in rendering the said services.

14. The *Ossian* was of the value of £30,000. In rendering the said services her owners incurred damage and expenses to the amount of about £400, and she deviated from her voyage and was delayed a considerable time in the performance thereof.

The defendants the owners of the *Lancaster* and of her cargo in their statement of defence in substance admitted that the services in the statement of claim mentioned had been rendered to the *Lancaster* in the manner and under the circumstances stated in the paragraphs thereof above set out, save that the risk and peril to the *Ossian* and the master and crew and the difficulty in rendering such services had been greatly exaggerated, and that the defendants required proof that the damage and expenses mentioned in the 14th paragraph of the statement of claim had been incurred. The statement of defence then alleged that the *Lancaster* was of 1145 tons net, and 1746 tons gross registered tonnage, that she was manned by a crew of twenty-five hands all told, and that she took the ground off Ras Garib about ninety-five miles from Suez at about 9 P.M., of the 27th of May, 1882, and remained in the same position until the *Ossian* came up about 8 A.M., of the 30th of the same month.

The action was heard before the judge assisted by two of the Elder Brethren of the Trinity House.

Myburgh, Q.C., and *L. E. Pyke*, for the plaintiffs.

Cohen, Q.C., *McLeod, Q.C.*, and *J. P. Aspinall*, for the defendants.

Witnesses were examined in court on behalf of the plaintiffs and of the defendants. Their evidence, as well as the evidence of certain witnesses for the plaintiffs who had been previously examined before a commissioner, was chiefly directed to the question of the amount of danger to which the two vessels and those on board them had been exposed. The log of the *Lancaster* on the voyage on which she received the assistance of the *Ossian* was put in in evidence on behalf of the plaintiffs, together with the protest of the former vessel extended before the British Vice-Consul at Dunkirk on the 11th of July, 1882, and it was proved that the plaintiffs had incurred damage and expenses to the amount of 100*l.* The material portions of the protest, and the result of the evidence of the witnesses, appear from the judgment.

For the purposes of the case the value of the *Lancaster*, her cargo and freight, was taken to be 62,000*l.*

SIR ROBERT PHILLIMORE. This is a most meritorious case of salvage service. The salvage service was rendered by one very large steamer, the *Ossian*, to another very large steamer, the *Lancaster*. Whilst passing along the Red Sea, about ninety-five miles from Suez, the *Lancaster* struck upon a rock five miles north of the point known as Ras Garib; coral reefs were all around her at the time, and the state of her peril may be taken from the captain's own protest, which gives an epitome of the service rendered in words which are true and cannot be gainsaid. The material portion of the protest commences as follows:—

"Left Bombay on May the 10th, 1882, bound for Dunkirk; May 20th passed Aden; May 27th strong wind and heavy sea, weather very hazy. At 8.30 P.M. Ras Garib abeam; at 9.15 P.M. the ship took the ground and struck repeatedly with great violence. Immediately reversed engines full speed astern, squared the yards, set topsail and foresail, and did all possible to

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try and back the ship off, but without avail. Seeing the vessel's critical position, consulted the officers, and taking into consideration the great distance to the nearest port from whence help could not possibly be had in less than six days, decided that the only means of saving the ship and cargo was to jettison a portion of the cargo." And then the captain proceeds to state as follows: "In the interest of all concerned, commenced throwing overboard the cargo in order to lighten the fore end. On the 28th of May continued to jettison, let go starboard anchor to keep ship's bow from driving in shore owing to the heavy swell running; ship thumping heavily; 2 P.M. tried to put out anchor from starboard quarter, but was prevented by the heavy sea; about 3 P.M. carpenters reported the No. 3 ballast tank to be filling; set pumps working continually, supposed hole in ship's bottom as the tank completely filled; 3.30 P.M. signalled an Inch Line steamer for assistance, he replied too much sea on, gave him ship's name and asked to be reported; 6.30 P.M. signalled for assistance to a S. S. bound towards Suez, but got no reply. 29th May fresh gale and short sea, ship thumping heavily; 6 A.M. started discharging from the after hatches on account of ballast-tank filling; stern of ship striking heavily; 8 A.M. got the boats ready for lowering, as the after peak was found to have filled; 5.30 P.M. succeeded in carrying out an anchor from the starboard quarter about 100 fathoms seaward, and kept a continual strain on it to keep the ship's stern from working in shore. 30th of May gale and sea continues; engineer reported ship straining under engine-room, still jettisoning cargo."

Whilst the *Lancaster* was in this condition she received the service rendered by the *Ossian* in this case. It is not immaterial to remember that before the *Ossian* came up the *Lancaster* had made signals to two other vessels passing up the Red Sea, and that they had been either unable or unwilling to render assistance to her. The effect of the help rendered to her by the *Ossian* was to release her from a position of the greatest peril, and according to the clear and decided opinion of the Elder Brethren, if she had remained many hours longer in the position in which she was when the *Ossian* came up, she would have been lost with all on board. It is not necessary to say more. Every

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element that could constitute a most valuable salvage service was present in this case, and one circumstance to be borne in mind is that the services were not effected without jeopardy to all on board the *Ossian*, as on the *Lancaster* coming off the reef the chains of the *Ossian* fouled both the anchors of the *Ossian* and the tow rope got foul of the *Ossian's* propeller so as to render it for the time useless. The only question remaining to be considered is the amount of compensation that should be awarded by the Court. The value of the ship, cargo, and freight is about 62,000*l*, and after due consideration and consultation with the Elder Brethren of the Trinity House, and taking into consideration all the facts, I award 6000*l*. Out of this award the mate of the *Ossian*, and those men belonging to the crew of the *Ossian* who acted as divers at great peril to themselves, should receive such shares as will adequately reward their services.

Solicitors for plaintiffs: *Plews & Irvine.*
Solicitors for defendants: *Pritchard & Sons.*

G. B.

THE KIRBY HALL.

Feb. 13.

Damage—Duty of Steamship under way in dense Fog—Regulations for Preventing Collisions at Sea, Arts. 13, 18, 20.

It is the duty of those who have charge of a steamship in motion during a dense fog, on first hearing the whistle of a steamship in such close proximity to them that risk of collision between the two vessels is involved, to bring their vessel immediately to a standstill on the water, and not execute any manœuvre with their helm until they have definitely ascertained the position and course of the other ship.

THIS was an action of damage carried on on behalf of the owners of the steamship *City of Brussels*, the owners of the cargo laden on board her, and her master, officers, and crew, and certain of her passengers proceeding for their private effects, against the steamship *Kirby Hall* and her freight.

1. The statement of claim alleged, so far as material, as follows:—

The *City of Brussels* is of 2435 tons register, and at the time

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of the collision hereinafter stated was bound on a voyage from New York to Liverpool, viâ Queenstown, with mails, a general cargo, about seventy passengers, and a crew of about 100 hands all told.

2. A little after 6 A.M. on the 7th of January, 1883, the *City of Brussels*, which had put into Queenstown to land mails and passengers and take a Liverpool pilot on board, had arrived off the North-West Lightship near the entrance to the sea channels leading to the River Mersey, and within sound of the lightship's steam fog-horn. At such time the wind was about S.E., there was a dense fog and the tide was flood. In these circumstances the *City of Brussels* was turned round and her head was brought to about W.N.W., and the engines were stopped so that she drifted up slowly stern foremost, drifting about a knot an hour, or rather more to E.S.E. with the tide, the regulation lights were exhibited and kept exhibited and burning brightly, the steam whistle was being sounded at short intervals, and a good look-out was being kept on board her.

3. Shortly before 6.50 A.M. those on board the *City of Brussels* heard the whistle of a steamer, which afterwards proved to be the *Kirby Hall*, on their starboard side before the beam. The whistle was answered each time it was heard, and after it had been so sounded and answered several times the masthead light of the *Kirby Hall* was seen about a ship's length off, and about two points forward of the starboard beam of the *City of Brussels*. The engines of the *City of Brussels* were immediately put full speed astern and the *Kirby Hall* was hailed to go astern; but the *Kirby Hall* with her stem struck the starboard side of the *City of Brussels* abaft the foremast, and did her such damage that she shortly afterwards sank with her cargo and the effects of her master, crew, and passengers, and two of her passengers and eight of her crew were thereby drowned.

4. A good look-out was not kept on board the *Kirby Hall*.

5. The *Kirby Hall* was being navigated at an improper and excessive rate of speed in the fog.

6. The engines of the *Kirby Hall* were not duly or in due time stopped or reversed.

7. Those on board the *Kirby Hall* improperly neglected to

comply with the rules contained in Articles 13, 18, and 20 of the Regulations for Preventing Collisions at Sea.

8. The helm of the *Kirby Hall* was improperly ported, and she was improperly brought across the course of the *City of Brussels*.

The owners of the *Kirby Hall* appeared as defendants, and their solicitors delivered a statement of defence and counter-claim which contained the following material allegations:—

The *Kirby Hall* is an iron screw steamship of 2700 tons gross belonging to the port of Liverpool, and was at and before the time of the collision hereinafter mentioned on a voyage from Glasgow to Liverpool with a crew of twenty-five hands and about 840 tons of cargo, and 792 tons of coal on board.

In the course of the said voyage the *Kirby Hall* at about 0.55 A.M. on the morning of the 7th of January, the Chicken-Rock Light being then in sight and bearing N.E., was placed on a S.E. ½ S. course, and so proceeded until about 5.10 A.M. on the said morning, when the weather became foggy and the steam whistle was blown and the *Kirby Hall* was slowed and then stopped. There was little or no wind. The regulation lights of the *Kirby Hall* were duly exhibited and were burning brightly, and a good look-out was being kept on board of her.

After being stopped for a few minutes the *Kirby Hall* was put on a S.E. by S. ½ S. course, and again proceeded at slow speed, her steam whistle sounding duly at short intervals.

Under these circumstances at about 6.45 A.M., the flood tide then running, those on board the *Kirby Hall* heard the fog-horn of the North-West Lightship apparently nearly ahead of them; and after it had been heard a second time, and a dense fog still continuing, the master of the *Kirby Hall* was about to bring the *Kirby Hall* to an anchor, when the whistle of a steamship, which afterwards proved to be the *City of Brussels*, was heard upon the port bow of the *Kirby Hall*. The engines of the *Kirby Hall* were then working dead slow, and the whistle of the *Kirby Hall* was blown in reply, and the whistle of the *City of Brussels* was then heard again, but closer on the port bow. The engines of the *Kirby Hall* were thereupon immediately stopped, and her helm was put hard a port when a white light of the *City of Brussels* was seen by those on board the *Kirby Hall* nearly ahead, and

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about from one to two ship's lengths distant, and the engines of the *Kirby Hall* were immediately reversed full speed astern, but shortly afterwards the stem of the *Kirby Hall* came into contact with the starboard side of the *City of Brussels* near the fore-rigging. The *Kirby Hall* received some damage from the said collision, and the *City of Brussels* sunk in about forty minutes.

Except as and so far as is hereinbefore expressly stated the defendants do not admit any of the several allegations of the 1st, 2nd, and 3rd paragraphs of the statement of claim.

The defendants deny each and all of the several allegations of fact and of negligence, improper conduct, and breach of regulations which are contained in paragraphs 4, 5, 6, 7 and 8 of the statement of claim, and deny that the said collision was caused by any of the matters in the said paragraphs alleged or otherwise howsoever by any negligence of the defendants or of those on board the *Kirby Hall*.

The said collision was, as regards the defendants and the *Kirby Hall* and those on board of her, an inevitable accident.

The said collision and the damages consequent thereon were caused and occasioned by the improper conduct and neglect of those on board the *City of Brussels*, in placing, keeping, and navigating the *City of Brussels* improperly and in an improper manner under the circumstances in the track and fairway of vessels bound to and from the port of Liverpool.

The said collision and the damages consequent thereon were caused and occasioned by the said negligence and improper conduct or otherwise by the negligence and improper conduct of the *City of Brussels* and those on board of her, and were not caused or contributed to by any negligence, or misconduct, or fault of the defendants, or the *Kirby Hall*, or those on board of her.

By way of set-off and counter-claim the defendants repeat the several foregoing paragraphs of the statement of defence.

A reply was delivered on behalf of the plaintiffs joining issue on the defence, denying the truth of the statements in the counter-claim, save such as admitted the averments in the statement of claim, and alleging that at the time and place of the collision the *City of Brussels* was in charge of a pilot by compul-

sion of law, and that the collision, if caused by the improper navigation of the *City of Brussels*, was solely caused by the default of such pilot.

Feb. 10, 12, 13. The action was heard before the judge assisted by two of the Elder Brethren of the Trinity House.

The allegations in such portions of the first three paragraphs of the statement of claim as are above set out, were substantially proved by witnesses called and examined in Court on behalf of the plaintiffs. Among such witnesses was the pilot in charge of the *City of Brussels* at the time of the collision. From his evidence it appeared that the *City of Brussels* had been rounded to with her head to the westward, about forty minutes before the collision took place; that during these forty minutes her engines had been stopped, and that he considered she was more under command with her engines stopped than she would have been if she had been anchored.

Before the case of the plaintiffs was closed, counsel on their behalf proposed to examine one of the witnesses called for the plaintiffs as to what was usually done as a custom of navigation by pilots and masters in charge of large steamships arriving off the entrance of the River Mersey near the North-West Lightship, when there was a dense fog and the tide was flood. They submitted that though, where Elder Brethren of the Trinity House were present to assist the Court, the evidence of expert witnesses on questions of general seamanship was inadmissible, yet that evidence of the customary mode of navigating vessels in a particular locality might, by the practice of the Court, be proved by witnesses examined in Court: *The Velocity* (1); *The Andalusian.* (2)

The admission of the proposed evidence was opposed by the counsel for the defendants. [They referred to *The Earl Spencer.* (3)]

SIR ROBERT PHILLIMORE. I think on the whole I ought not to admit the evidence in question. I think it is evidence on a

(1) Law Rep. 3 P. C. 44. (2) 2 P. D. 231.
(3) Law Rep. 4 A. & E. 431.

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point on which it is the province of the Trinity Masters to advise the Court, and I do not think I ought to do anything which will go any way towards allowing the examination of expert witnesses on questions of nautical skill and seamanship in cases where the Court is assisted by the Trinity Masters. (1)

The master of the *Kirby Hall* and other witnesses gave evidence in Court on behalf of the defendants in support of the statement of defence. With reference to the manœuvres of the *Kirby Hall*, and the course taken on board her when and after the whistle of the *City of Brussels* was heard for the first time, evidence was given by the master of the *Kirby Hall*, who was in charge of her at the time of the collision, to the following effect: "I considered the vessel which proved to be the *City of Brussels* was a vessel going to the eastward, and having formed that judgment, and also because the sound of her whistle appeared to be broad on my port bow, I did not stop and reverse the first time her whistle was heard. Owing to the density of the fog, I thought no vessel could come out from Liverpool. When I ordered the helm of the *Kirby Hall* to be ported, I considered I was in danger of a collision, and that by porting I should ease the blow."

The result of so much of the remainder of the evidence as is material can be gathered from the judgment.

Butt, Q.C., Webster, Q.C., and *W. G. F. Phillimore*, for the plaintiffs. The *City of Brussels* is not to blame for the collision. In the circumstances it would have been dangerous for her to have anchored. [SIR ROBERT PHILLIMORE. The *City of Brussels* is, in the opinion of the Trinity Masters, in which opinion I concur, not to blame for the collision. We do not think any blame attaches to the *City of Brussels* for not having anchored. The Trinity Masters have not at present given me any advice as to whether the *Kirby Hall* is or is not to blame.] The question then remains whether the *Kirby Hall* is not solely to blame for the collision. She proceeded with her engines going ahead after those on board her first heard the whistle of the *City*

(1) See *The Gazelle*, 1 Wm. Rob. 474.

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of Brussels, and her master ported her helm before he knew the position or course of that vessel. For these reasons the *Kirby Hall* is to blame under the express authority of the ruling of the Court of Admiralty and the Judicial Committee of the Privy Council in the case of *The Frankland* (1), which has recently been followed in this Court in the cases of *The Gem* (2) June, 1878, and *The Calvilla* (2) November, 1882.

Sir F. Herschell, S.G., *Myburgh, Q.C.*, and *Bucknill*, for the defendants. The *Kirby Hall* is not to blame, and the collision was an inevitable accident. The engines of the *Kirby Hall* were stopped directly the whistle of the *City of Brussels* was heard the second time, and those on board the *Kirby Hall* did all they could to avoid the collision. The question whether the decision in *The Kestrel* (1) is or is not applicable to any particular case must depend on the circumstances, and in many cases it would be absolutely dangerous for a steamship in a dense fog to stop directly she heard the whistle of another steamship in her vicinity. Moreover, under the 13th Article of the Regulations for Preventing Collisions at Sea, a vessel in a fog is entitled to go at a moderate speed.

SIR ROBERT PHILLIMORE. This is a case of collision which happened between six and seven o'clock on the morning of the 7th of January, 1883, in Liverpool Bay, near the North-West Lightship. The vessels which came into collision were the screw steamship *City of Brussels*, and the screw steamship *Kirby Hall*. The *City of Brussels* was a very large steamer of 3700 tons gross, and the *Kirby Hall* was of 2700 tons gross. The *City of Brussels* was proceeding from New York to Liverpool with thirty passengers and a crew of 100 hands, and the *Kirby Hall* was proceeding with a crew of twenty-five hands and 793 tons of coal on board from Glasgow to Liverpool. The stem of the *Kirby Hall* came into contact with the starboard side of the *City of Brussels*, which received such damage in the collision that she sank in about forty minutes.

There was a dense fog at the time, as dense a fog as one can well imagine, according to the account given on both sides; and

(1) Law Rep. 4 P. C. 529. (2) Not reported.

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I think the doctrine laid down in the case of *The Frankland* (1), to which the Court has been referred, is one which covers the present case, and upon the principles of which the present case must be decided. A passage in my judgment in that case has been referred to in the argument, but I will read it again, "both vessels were going in truth in the most absolute uncertainty"—which was the case here—"as to the proceedings of the other, and in such a state of circumstances I have had to ask myself this question, could anything have been done to avoid this collision, which was not done? And the opinion of the Court fortified by that of its nautical assessors is, that upon hearing the whistles of each other, so near and approaching each other, each vessel ought not only to have stopped but to have reversed until its way was stopped"—that is the part of the judgment of the Court of Admiralty to which attention should be more carefully drawn—"when it could have hailed and ascertained with certainty which way the head of the other vessel was, and which way she was proceeding, and by that means the collision would or might have been avoided."

We have already arrived, and I mentioned the fact at an earlier stage of this case, at the conclusion that the *City of Brussels* is free from blame for this collision. We have therefore only to deal with the questions whether the *Kirby Hall* is to blame, or whether the collision was an inevitable accident. Taking into consideration the judgment to which I have just referred, and others to which the attention of the Court has been drawn, and having special reference to the facts of this case, we have arrived without hesitation at the conclusion that the *Kirby Hall* is solely to blame by reason of not stopping her way on the water when the whistle of the *City of Brussels* was heard the first time, instead of going ahead without knowing where the *City of Brussels* was or what she was doing, and we wish to state with as much emphasis as possible, that those in charge of a ship in such a dense fog as was described in this case should never conjecture anything when they hear a whistle in such close proximity as was the case here, whether the sound appears to them to come from a vessel approaching them or not. In the dense fog which is proved to have prevailed in this case, those on board the *Kirby Hall* were bound

(1) Law Rep. 4 P. C. 529.

not to speculate, but to bring their vessel to a standstill on the water at once. It is upon these principles that I decide the present case, and pronounce the *Kirby Hall* alone to blame for the collision.

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Solicitors for plaintiffs: *Hill, Dickinson & Co.*
Solicitors for defendants: *Bateson, Bright, & Warr.*

G. B.

[IN THE CHANCERY COURT OF YORK.]

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Nov. 4.

DEAN AND OTHERS *v.* GREEN.

Ecclesiastical Law—Application by Bishop of Diocese for Discharge of Clerk in Custody for Contempt—Deprivation under Provisions of Statute Law—Satisfaction of Contempt by involuntary Obedience—Public Worship Regulation Act, 1874 (37 & 38 *Vict. c.* 85), *s.* 13—53 *Geo.* 3, *c.* 127.

At the hearing of the matter of a representation made under the Public Worship Regulation Act against the rector of a parish church in the diocese of Manchester and province of York, the Official Principal of the Chancery Court of York pronounced that the defendant when officiating in the parish church had committed certain offences against ecclesiastical law, and on the 27th of June, 1879, issued a monition admonishing him to refrain from such offences for the future. The defendant failed to obey the monition, and the Official Principal, in August, 1879, by an inhibition under the Public Worship Regulation Act, inhibited him for three months, and, until the inhibition had been relaxed, from performing the services of the church or exercising the cure of souls within the diocese of Manchester. Whilst the inhibition was still in force the defendant disobeyed it by officiating in the parish church on several occasions, and thereupon his contempt was signified to the Queen in Chancery, and he was in March, 1881, taken into custody under a writ de contumace capiendo. In August, 1882, the defendant still remained in custody under the writ, but, by the operation of the Public Worship Regulation Act, ceased to be rector of the parish. The Bishop of Manchester then applied to the Official Principal for the discharge of the defendant. The application was neither supported by the defendant nor opposed by the complainants:—

Held, that the application was rightly made by the Bishop of Manchester:

Held, also, that the defendant had "satisfied his contempt" within the meaning of 53 Geo. 3, c. 127, and that a writ of deliverance in the form prescribed by that statute ought to issue for his discharge.

IN this case the Archbishop of York by a requisition under the Public Worship Regulation Act, 1874, required the Official Principal of the Chancery Court of York to hear and determine

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at any place in London or Westminster or within the province of York, the matter of a representation made in pursuance of that Act, and in which the Rev. Sidney Faythorne Green, rector of the rectory and parish church of St. John the Evangelist, Miles Platting, in the diocese of Manchester, was the party complained of. The representation which had been originally made to the Bishop of Manchester alleged, in the first nine paragraphs thereof, that the Rev. S. F. Green had, when officiating on certain Sundays in his parish church in the Communion Service, unlawfully mixed water with the sacramental wine and administered wine mixed with water to the communicants at the Lord's Supper; unlawfully used lighted candles on or immediately above the Communion table; wore certain unlawful ecclesiastical vestments, to wit, a chasuble, a stole of a green colour, and a girdle; unlawfully knelt when reading the consecration prayer in the Communion Service; in an unauthorized manner elevated the paten, or bread, or wafer and the cup; after receiving the alms contributed at the offertory elevated the same, and immediately placed them on the Credence table; unlawfully made the sign of the Cross towards the congregation; unlawfully stood whilst saying the prayer of consecration at the middle of the west side of the Communion table with his back to the people; and unlawfully, and in a ceremonial manner, and as a part of the Communion Service, washed the cup which had been used in the administration of the Communion.

The representation further alleged, in the tenth paragraph, that Mr. Green without lawful authority and unlawfully and since the consecration of his parish church had placed, and still retained, on or immediately above the Communion table, a large cross of brass.

On the 10th of June, 1879, the Official Principal of the Chancery Court of York, the Right Honourable Lord Penzance, pronounced that the complainants had sufficiently proved the allegations contained in the first ten paragraphs of the representation respectively, and in respect of the practices, matters, and things alleged in those paragraphs, had offended against the law ecclesiastical, and on the 27th of June a monition issued under the seal of the Chancery Court of York admonishing Mr. Green

to refrain for the future when officiating in his church of St. John the Evangelist, Miles Platting, from the practices, matters, and things, in respect of which he was so pronounced to have offended against the law ecclesiastical, and from all practices, matters, and things, of a like nature, and further, to remove the brass cross referred to in the 10th paragraph of the representation. After the service of this monition Mr. Green disobeyed it by, when officiating in his parish church, repeating several of the offences from which he had been admonished to refrain, and consequently, on the 16th of August, 1879, an inhibition under the seal of the Chancery Court of York issued inhibiting Mr. Green, for the term of three months from the publication of the inhibition, and thereafter until the same had been duly relaxed, from performing any service of the church, or otherwise exercising the cure of souls, within the diocese of Manchester. This inhibition was, on the 24th of August, 1879, duly published by being affixed on the principal door of the parish church of St. John the Evangelist, Miles Platting, and was, on the same day, personally served on Mr. Green, but Mr. Green, after the service of the inhibition, and while it was in force, disobeyed it by acting as the officiating minister in the public celebration of the Holy Communion in the church of St. John the Evangelist, Miles Platting, on Sunday the 20th of June, 1880, and Sunday the 4th of July, 1880.

On the 20th of November, 1880, counsel on behalf of the complainants moved that Mr. Green should be pronounced guilty of contempt of Court by reason of his disobedience to the inhibition in respect of his having performed divine service, and otherwise exercised the cure of souls, in the church of St. John the Evangelist, Miles Platting, since the service of the said inhibition. The motion was supported by affidavits, and notice of it had been duly given to Mr. Green, who did not appear, and the Official Principal thereupon pronounced that Mr. Green had been guilty of manifest contumacy and contempt of the law and jurisdiction ecclesiastical in not obeying the commands contained in the inhibition, in that he had acted as officiating minister in the public celebration of the Holy Communion in the church of St. John the Evangelist, Miles Platting, on the two Sundays above mentioned, and directed

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that his contumacy and contempt should be signified to the Queen in Chancery.

In accordance with this direction a significavit sealed with the seal of the Chancery Court of York, and under the signature of the Deputy Provincial Registrar of that Court, issued, on the 25th of November, 1880, and the tenor of the same having been sent by mittimus from the Petty Bag Office to the Chancellor of the County Palatine of Lancaster, Mr. Green was, under the authority of a writ of attachment out of the Chancery of Lancaster, reciting the significavit and mittimus, and directed to the sheriff of the county of Lancaster (1), arrested on the 19th of March, 1881, and lodged in the gaol of Lancaster Castle. (2)

On or about the 31st of October, 1882, a statement of motion, entitled in the cause and signed by the Bishop of Manchester's solicitor, was filed in the Provincial Registry of the Chancery Court of York. This statement of motion, which was dated the 30th of October, 1882, after referring to the issue of the monition of the 27th of June, 1879, the issue of the inhibition above mentioned, and the subsequent proceedings in the suit leading to Mr. Green being arrested and lodged in her Majesty's prison at Lancaster, and stating that he still remained there, proceeded in substance in the following terms: "The said inhibition having remained in force for more than three years from the date of the issuing of the said monition, and there having been no appeal therefrom, and the Bishop of Manchester not having exercised his statutory power of postponing the avoidance, the Rectory of St. John the Evangelist, Miles Platting, has become void in accordance with the provisions of the 13th section of the Public Worship Regulation Act, 1874, and formal notice of the avoidance has been sent by the said bishop to the patron. Under such circumstances the detention of the said Reverend S. F. Green is, in the opinion of the said bishop, unnecessary and inexpedient. The Court will accordingly be moved, on behalf of the Bishop of Manchester, to the discharge of the said Reverend S. F. Green."

(1) The writ was tested as in the name of the Queen at Lancaster, and was undersigned by the Vice-Chancellor of the Duchy of Lancaster.

(2) For unsuccessful proceedings to obtain the release of Mr. Green, see *Ex parte Green* (7 Q. B. D. 273); *Green* v. *Lord Penzance* (6 App. Cas. 657).

In support of the proposed motion an affidavit was filed, in which Mr. Burder, the Secretary of the Bishop of Manchester, and Deputy Registrar of the Diocese of Manchester, deposed that at the date the affidavit was sworn Mr. Green still remained in custody under the writ under which he was arrested, and that the power of postponing the avoidance of the Rectory of Miles Platting under the 13th section of the Public Worship Regulation Act had not been exercised by the Bishop of Manchester. (1)

Nov. 4th. *R. C. Christie*, and *G. O. Moore*, on behalf of the Bishop of Manchester, moved the Official Principal of the Chancery Court of York for the discharge of Mr. Green from custody in accordance with the statement of motion. (2) The circumstances of this case are such as to give the Bishop of Manchester a right to appear here and ask for the release of Mr. Green. Not only has Mr. Green ceased to be the rector of the church of St. John the Evangelist, Miles Platting, but divine service is now performed there by a nominee of the Bishop of Manchester appointed to act during the vacancy of the living. If sufficient cause be shewn for Mr. Green's discharge, the Court has the power to order a writ of deliverance to issue without the consent of the complainants; for the order which Mr. Green disobeyed and the disregard of which led to his imprisonment, i.e. the prohibition against repeating certain offences as officiating minister in the church of St. John the Evangelist, Miles Platting, has exhausted itself, and the complainants have no longer any interest under the proceedings in the suit which the Court by refusing Mr. Green's discharge can protect.

[LORD PENZANCE. I am very well satisfied that I have the power, if fit cause be shewn for its exercise, to order the defendant's discharge on the present application.]

Jeune, on behalf of the complainants. The complainants do not admit that the application for the discharge of a prisoner, imprisoned as contumacious in consequence of disobedience to

(1) Notice of the proposed motion was given to the complainants and their solicitors.

(2) The Court sat in one of the rooms of the palace of Westminster.

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the orders of an ecclesiastical Court, can be legally made by any one not a party to the suit in which the orders so disobeyed were pronounced, but following the course pursued by the complainants in *Hudson* v. *Tooth* (1) they are ready to consent to an order for Mr. Green's discharge being made, on the ground that a clergyman appointed by the bishop of the diocese is now the officiating minister in the church of St. John the Evangelist in Mr. Green's stead. In fact the complainants do not oppose the discharge of the defendant if only the Court be of opinion that the authority of the Court has been sufficiently vindicated, and that adequate guarantees exist for peace and order at Miles Platting.

LORD PENZANCE. I cannot but express my surprise that an application of this kind should not have been made before on Mr. Green's behalf. It is now some time—the exact date is not material—since Mr. Green was, by virtue of the provisions of the Public Worship Regulation Act, deprived of his living, and ceased to be rector of Miles Platting. That this altered his position as defendant in this suit cannot be doubted. For what was this suit? and for what purpose and by whom was it instituted? It was instituted by persons who, being parishioners of the parish of Miles Platting, considered themselves aggrieved by the way in which Mr. Green, their then rector, performed the services of the church, and the object of the suit was to compel Mr. Green to desist from the illegal practices of which they complained, and to perform the services in future in a manner conformable to the ecclesiastical law. With the deprivation of Mr. Green the purpose and object of the suit came to an end, the interests of the promoters of the suit as parishioners in the conduct of their rector were no longer affected, and the character in which Mr. Green was made a party to the suit, and was cited to appear in this Court, ceased to be borne by him. And yet he is still in prison. One would have thought that, in a situation so wholly changed from that in which the order for his imprisonment was made, he would have hastened to apply to the Court for his discharge. If it was supposed that there were any technical difficulties arising out of the precise terms of the statutes appli-

(1) 2 P. D. 125.

cable to the case which stood in the way, he might at least have given the Court an opportunity of considering what those difficulties were, and how far they could be overcome. But he has not done so; and his bishop has in my judgment done wisely and well, and indeed a public service, by coming forward to take his place, and giving the Court the opportunity of dealing with this matter, which it could not have done if no application had been made to it. I proceed therefore to consider Mr. Green's present position, in connection with the statutes by force of which he has been imprisoned, for the purpose of ascertaining whether I have the power, as judge of this Court, to give effect to the opinion which I have above expressed, that having been deprived of his benefice he is justly entitled to his discharge. It is necessary to revert for a moment to the causes which led to his imprisonment. He was admonished by this Court to discontinue certain illegal practices, and upon his refusing to do so he was inhibited in the form prescribed by the Public Worship Regulation Act from performing any service of the church within the diocese. He paid no attention to this inhibition, but continued to perform the services of his church. It was for this disobedience in continuing his ministrations after he had been ordered to suspend them, that his contempt was signified to the Court of Chancery under the provisions of the statute 53 Geo. 3, c. 127, and he was, in pursuance of a writ issued from that Court, taken into custody. In so signifying his contempt I had an unwelcome duty to perform; but in looking back upon it after all that has happened, I fail to see that I could have done otherwise. It is no doubt a public misfortune, that an educated man, of stainless character, should be cast into prison, and still more so if he is a minister of religion. But the law must be obeyed, and it would be a still greater public misfortune if the lawful orders of those who administer the law could be derided, and set at nought, with impunity. The interests of those who promoted the suit, who were parishioners of Mr. Green, and as such entitled to his lawful ministrations, had also to be considered. They were persons "aggrieved," in the language of the statute, and approached this Court to obtain redress for their grievances. It was impossible, without dereliction of duty on my part, to refuse to put in force such powers as the Court possessed

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to compel Mr. Green's obedience when desired to do so by those for whose benefit the suit was instituted. But all this is changed now—he is no longer their rector, and they are no longer his parishioners—and the order of the Court, so far as it enjoined him not to perform the services of his church as rector of Miles Platting, can no longer be obeyed or disobeyed, as he is no longer rector of that parish. Still the question is not, whether, as a matter of justice, Mr. Green ought to be liberated, but whether I have the legal power to order his liberation. This depends wholly in my opinion upon the provisions of the statute above referred to, by virtue of which his imprisonment took place. There is indeed a subsequent statute, passed in the present century, which enlarges the powers of the judge in this respect, but it is clogged with a proviso that the promoters of the suit give their consent, which they have not hitherto done. It may not unfairly be argued that as the promoters' interests in the present suit have come to an end, a construction might be placed on this statute, dispensing with this proviso, which was apparently intended only to safeguard those interests. But I do not feel myself at liberty to dispense with the positive language of an Act of Parliament in this manner. It may also be urged that as every Court has the power of pronouncing for itself what constitutes a contempt, so it must have the power of deciding for itself what may constitute a condonation or satisfaction of contempt. This, I think, is true; and when a Court has the power of imprisonment for contempt, it has also the power of release. But this Court, and all ecclesiastical Courts, although they are the Courts of the Sovereign and administer the Queen's ecclesiastical law, have not, and never have had, as incident to their jurisdiction, the power of imprisoning Her Majesty's subjects for contempt. Up to the time when the above statute of George III. was passed, their ordinary method of coercion and punishment was by a sentence of excommunication; and as it is by reason of the above statute alone that this Court had power to imprison Mr. Green, it must be in conformity with that statute, if at all, that the Court has power to release him. I proceed to examine its provisions. The first section declares that when any person shall neglect to pay obedience to the

lawful order of an ecclesiastical Court it shall be lawful for the judge whose orders have not been obeyed to pronounce such person in contempt, and to signify the fact to the Court of Chancery, whereupon a writ of attachment is at once to issue for the person's imprisonment. The offence therefore for which the imprisonment is to take place is neglecting to pay obedience to the orders of the Court.

I now turn to the provisions made for the release of a person so imprisoned. The statute provides that upon the obedience of the party, so not having obeyed as aforesaid, the judge shall "pronounce such party absolved from the contumacy and contempt," and shall forthwith make an order for his discharge. As in the former part of the first section, the not having obeyed constituted the contempt; so the obedience of the party is made to constitute the satisfaction of the contempt, and to confer a right to be discharged. So far all is plain—the imprisonment is obviously intended to enforce obedience—and the obedience once rendered, the imprisonment is to come to an end. Has then Mr. Green obeyed the Court? There is no doubt whatever that, up to the present time, he has not done so willingly; but has he done so, in fact, against his will? What was the order of the Court? I have already stated that it was this, that he should abstain for a time from the ministrations incident to his holy office. And he has so abstained, not willingly indeed—very much the contrary—but actually and effectually. A court of justice in many, if not most instances of imprisonment for contempt, has no power to make the offender obey its orders, except through such pressure as his confinement may exert upon him to induce him to do so, and if the offender is tolerably obstinate this pressure may be ineffectual. But in this particular case it has so happened that the order of the Court was not an order to do or perform any act whatever, but only to abstain from doing certain things and performing certain acts which could not possibly be performed in prison. The Court therefore had the means, and was driven by Mr. Green to use them, of making his further disobedience impossible, and securing a compliance with its orders with or without his consent. It was open to him to render a willing obedience that he might retain his liberty; he has chosen to

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sacrifice his liberty, that obedience might be extorted from him. And so up to the present time he has obeyed.

But what guarantee, it may be asked, is there that he will do so in future? The answer to this, I think, is, that the inhibition must be considered practically to have come to an end with Mr. Green's deprivation. The Public Worship Act does not in so many words say so, but it provides in the 13th section that the inhibition is at first to be only for a period of three months, and then that it is not to be relaxed until the incumbent undertakes to obey the monition, and then it proceeds to say that if the inhibition remains in force unrelaxed for three years, the benefice of the incumbent is to become void. It is impossible, I think, not to regard the greater and ultimate penalty of deprivation as intended to take the place of, and supersede, the inhibition. If indeed the inhibition is regarded as an order by the Court not to officiate as incumbent of the parish in respect of which the suit is instituted, it must necessarily come to an end when the incumbency ceases. And although there are words to be found, in the form of inhibition which the statute enjoins, extending its operation to the whole diocese, the primary, and not only the primary, but the substantial, purport of the inhibition in this case was, that Mr. Green should no longer perform the services of the church as rector of Miles Platting. I cannot doubt but that if Mr. Green had applied to the Court for his discharge, at any time during his incumbency of that parish, and offered his assurance that he would in future, so long as the inhibition lasted, abstain from ministration in his parish of Miles Platting (saying nothing about the rest of the diocese), I should have felt bound to accept that assurance as a substantial compliance with the Court's order; and, to use the words of the statute, a reasonable "satisfaction of his contempt." I have arrived, therefore, at this point in the inquiry. Mr. Green has, in fact, obeyed the order of the Court contained in the inhibition, up to the time of his deprivation, and there is no such order any longer in force binding upon him in the future. Is this enough to satisfy the terms of the statute of George III., and justify his discharge, bearing in mind that his obedience has been quite involuntary and extorted from him? No doubt would,

I think, have been entertained on this subject but for some words which are to be found in the forms appended by a schedule to that statute. I allude to the form of the writ under which he was arrested, and the form of the writ under which, if at all, he is to be released. This writ of capias recites the contempt and commands the sheriff to "attach the said A. B. by his body until he shall have made satisfaction for the said contempt." The writ of deliverance recites the former writ, and then goes on thus: "Now he having submitted himself, and satisfied the said contempt, we command you to cause the said A. B. to be delivered" out of prison. As regards making satisfaction for his contempt, Mr. Green has, I think, by his lengthened imprisonment, and his actual obedience to the Court's order, abundantly done so. But can it be said that he has "submitted himself?" I think it would be straining this language from its natural meaning to say that he had; and if these words had been found in the enacting part of the statute as the condition upon which the judge has the power to discharge him, I am afraid I should have been bound to refuse to order Mr. Green's release. But they are not to be found there, —the only condition there named is that he shall have "obeyed," and a man who abstains from doing a thing which he is ordered not to do, and in point of fact does not do it, does, I think, "obey," whatsoever be the cause which leads to his not doing it. If, for instance, he had been confined to his bed by illness, or, indeed, prevented by any cause external to his own choice from doing the thing prohibited, he none the less, as it appears to me, obeys the prohibition; though he were minded if he could do so to set it at defiance. It would be hard indeed if he were at one and the same time compelled to comply with the Court's order and punished for not doing so. It is enough, I think, if the orders of courts of justice be complied with—to go further and investigate the motives of compliance is beyond their province, as it may probably be beyond their power. Such being the effect of the enacting portions of the statute, it would be quite contrary to the recognised principles upon which courts of law construe Acts of Parliament, to enlarge the conditions of the enactment, and thereby restrain its operation, by any reference to the words of a mere form, given for convenience' sake in a schedule, and still

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more so, when that restricted operation is not favourable to the liberty of the subject, but the reverse. It is needless to cite authorities for these principles of construction, but it so happens that there is in existence a most apposite one by a judge of high repute (Lord Cottenham) in relation to the schedules of this very statute. In *Re Baines* (1) he said, speaking of this very schedule, "if the enacting part and the schedule cannot be made to correspond, the latter must yield to the former." It is not difficult moreover to perceive how it came about that these words, "submitted himself," found their way into this form. The Act did not deal only with contempts committed by disobeying the orders of the Court, but also with contempts committed "in the face of the Court," that is to say, insults to the Court, or obstructions to its proceedings when sitting. For such contempts, it is obvious enough that "submission" and not "obedience" would be properly required by the Court, before the offender was discharged. And accordingly the statute in its enacting part, when describing the conditions upon which persons offending by different forms of contempt should be liberated, uses the following language, "upon the due appearance of the party so cited, and not having appeared as aforesaid, or the *obedience* of the party so cited, and not having obeyed as aforesaid, or the *due submission* of the party so having committed a contempt in the face of the Court," the judge shall pronounce such party absolved from his contempt. Those who framed the statute, therefore, when drawing up the forms in the schedule in question, seemed to have inadvertently framed this writ of deliverance, which was intended to be used in cases of "disobedience" as well as of contempts committed "in the face of the Court," in language which appears to me to be in strictness appropriate to the latter class of contempts only. But this is a matter of small import. If under the effective words of the statute Mr. Green is entitled to his release, as I think he is, I shall not be deterred from ordering that release, because I am obliged, in deference to the statute, to make use of a form the recitals of which (as I interpret them) do not correspond with the facts. There is little more to be said; the Court having exacted obedience to its decree is well satisfied to

(1) 1 Cr. & P. 31.

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be able, by a reasonable interpretation of the statute, to put an end to an imprisonment which Mr. Green appears so little anxious to put an end to himself. So long as Mr. Green was rector of Miles Platting it was necessary to detain him in prison to prevent his open disobedience to and defiance of the order which the Court had made, that he should forbear from all performance of Divine service in his parish. When he ceased to be rector of Miles Platting, the necessity for his imprisonment ceased also. Anything like an attempt to obtain from him a recognition, however tardy, of the duty which he owes to his Sovereign and his country in rendering a willing compliance to the laws under which he lives and under which he held his preferment, would involve a struggle with him entirely beneath the dignity of the Court. I therefore pronounce Mr. Green to have satisfied his contempt, and I direct the registrar to affix the seal of this Chancery Court of York to a writ of deliverance in the form prescribed by the statute.

Solicitor for Bishop of Manchester: *S. Dunning.*
Solicitors for complainants: *Tebbs & Sons.*

G. B.

THE BIANCA.

1883

April 5.

Practice—Third Party—Rules of Supreme Court, 1875, *Order XVI. rr.* 18, 21 *—Vessel at Anchor—Tow and Tug.*

In an action for damage by collision brought by a vessel at anchor against a vessel in tow of a tug, the owners of the tug were made third parties under Order XVI. rule 18, as the defendants claimed to be indemnified by the owners of the tug against the plaintiffs' claim on the ground that the improper navigation, if any, was that of the tug. An application for directions under Order XVI. rule 21 was subsequently made, and the plaintiffs thereupon asked that the third parties should be dismissed from the action on the ground that the plaintiffs would be embarrassed by the proceedings between the defendants and the third parties:—

Held, that the third parties must be dismissed, as under the circumstances questions would probably arise between them and the defendants by which the plaintiffs might be embarrassed, as they were different from those upon which the action between the plaintiffs and defendants would turn.

THIS was an action for damage by collision brought by the steamtug *Gamecock* against the ship *Bianca*. The collision occurred on the 15th of January, 1883. At about 2 P.M. on that day, it was averred in the statement of claim, the *Gamecock*

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was lying at anchor in the Mersey, off the Albert Dock wall. The tide was then about two hours off high water. The *Bianca* came out of the Albert Dock in tow of the steamtug *Rescue*, broadside to the tide, and drifted up the river towards the *Gamecock*. The *Rescue* steamed across the bows of the *Gamecock*, and the latter paid out chain to avoid a collision, but the *Bianca* nevertheless struck her. It was also averred that the *Bianca* neglected to keep a proper look-out, to keep in the wake of the *Rescue*, and whilst in tow of her improperly attempted to cross the bows of the *Gamecock*.

On the 25th of February, Sir R. J. Phillimore made an order in chambers that the defendants should be at liberty to serve a notice on the owners of the *Rescue* claiming to be indemnified by them under Order XVI., rule 18, against any claim by the plaintiffs for damages on the ground that the improper navigation, if any, was that of the tug. This notice was served, and the owners of the *Rescue* entered an appearance.

Subsequently the defendants delivered a statement of defence alleging that the *Bianca* ordered the *Rescue* to tow her out of dock, which she did, and at full speed, which she failed to do; that as soon as it was seen that the *Bianca* was drifting towards the *Gamecock*, the engines of the *Rescue* were again ordered full speed ahead, and that those on the *Gamecock* were hailed to pay out chain, but that this was done so slowly and without her engines being moved ahead that she fell very little up the river before the *Bianca* came into collision with her. The defendants also averred that the *Gamecock* was improperly anchored so as to be an obstruction in the river, and that those on the *Gamecock* omitted to take proper measures to avoid the collision. By the 10th paragraph they pleaded in the alternative that the collision was caused by the improper navigation of the *Rescue* and her disobedience to the orders from the *Bianca*.

On the 3rd of April an application was made to Butt, J., in chambers to give directions under Order XVI., rule 21.

E. S. Roscoe, for the defendants, asked that directions should be given under Order XVI., rule 21. He referred to *The Cartsburn*. (1)

(1) 5 P. D. 59.

W. R. Kennedy, for the plaintiffs, asked that the third parties should be dismissed from the action. When a third party is brought in under Order XVI., rule 18, the question between him and the defendant and the defendant and the plaintiff must be the same, and that is not the case here. Secondly, the plaintiffs will be embarrassed by a third party being brought in, as the questions between tug and tow are not the same as those between the plaintiffs and defendants. [He referred to *Schneider* v. *Batt* (1); *Horwell* v. *London General Omnibus Co.* (2); *Treleaven* v. *Bray* (3); *Bower* v. *Hartley*. (4)]

W. G. F. Phillimore, for the *Rescue*, objected to being brought into the action.

Roscoe, in reply.

Cur. adv. vult.

April 5. The summons was adjourned into Court, and judgment was delivered by

BUTT, J. In this case I have come to the conclusion, after considering the authorities which bear upon it and carefully reading the pleadings, that there are valid reasons why, in the exercise of my discretion, I must decline to give any directions under Order XVI., rule 21. Assuming that I have jurisdiction to make the order asked for, I see no sufficient reasons in face of the plaintiffs' opposition why I should embarrass the issue between them and the defendants with any further question as to the rights and liabilities of the defendants and third parties inter se. It is obvious from the pleadings that it is extremely probable that questions will arise between the defendants and the third parties totally different and distinct from those which are necessary for the decision of the action as between the plaintiffs and the defendants. In these circumstances the third parties will be dismissed from the proceedings, and the defendants must pay the costs of these proceedings including those of the first summons.

Solicitors for plaintiffs: *Williamson, Hill, & Co.*
Solicitors for defendants: *W. W. Wynne & Son.*
Solicitors for third parties: *Toller & Sons.*

(1) 8 Q. B. D. 701.
(2) 2 Ex. D. 365.
(3) 1 Ch. D. 176.
(4) 1 Q. B. D. 652.

E. S. R.

1883
March 3.

[IN THE COURT OF APPEAL.]

ROBERTSON *v.* ROBERTSON AND FAVAGROSSA.

Order for Permanent Maintenance—Maintenance of Wife against whom a Decree for Dissolution has been made—20 & 21 *Vict. c.* 85, *s.* 32.

A decree nisi for dissolution of marriage was made against a wife on the 3rd of August, 1880, and was made absolute in due course. The wife appealed, and her appeal was dismissed on the 19th of July, 1881. On the 30th of July she took out a summons to have permanent maintenance allowed her. Owing to her absence abroad the summons was not heard till December, 1882, when the President dismissed it. The wife appealed:—

Held, on appeal, that as the application to the President was out of time, and he had exercised a discretion under the special circumstances of the case, the Court would not interfere with his decision.

Whether special circumstances are required to induce the Court to give permanent alimony to a wife against whom a decree for dissolution is made, and who has no means of support, *quære*.

On the 3rd of August, 1880, a decree nisi was made at the suit of the husband for dissolution of the marriage, and this decree was made absolute in due course. Mrs. Robertson appealed, and on the 19th of July, 1881, the appeal was dismissed subject to a variation of the order as to costs. (1)

On the 30th of July, 1881, Mrs. Robertson took out a summons for the petitioner to shew cause why he should not pay such a sum to the applicant for permanent maintenance from the 3rd of August, 1880, as the Court might think fit, or that she might have leave to file a petition for such maintenance under rule 95 of the Rules and Regulations of 1866. This summons did not come on for hearing before the long vacation. In September, 1881, Mrs. Robertson went abroad, and was, as she deposed, left in Paris without money to enable her to return. In September, 1882, she returned to England, and was now, as she deposed, left without any means of support. On the 29th of November, she obtained an order to change her solicitor, and the application was brought on before the President of the Divorce Division, who, on the 19th of December, 1882, dismissed it.

Mrs. Robertson appealed, and the appeal came on to be heard on the 21st of February, 1883.

(1) 6 P. D. 119.

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Mrs. Robertson in person having opened the case, the Court asked the counsel for Mr. Robertson what were the grounds on which the President had refused the application. Their Lordships referred to the old practice of the House of Lords when divorces were obtained by private Act of Parliament of requiring the husband to make some provision for the wife when she had no means of support, and to s. 32 of the Divorce Act, 1857.

Inderwick, Q.C., and *Middleton*, for Mr. Robertson. The practice under the Divorce Act in this respect has not been similar to that of the House of Lords under the old law. Up to this time permanent alimony for a guilty wife has not been ordered except with the consent of the husband, or under special circumstances.

[JESSEL, M.R. I am sorry to hear it. I am not giving a final opinion, but it appears to me that s. 32 was intended to give the Court a discretion which was to be exercised according to the circumstances of each case, and that it was not intended that a guilty wife should be turned out into the streets to starve.]

In *Bent* v. *Bent* (1), where the husband had received money with his wife, he was ordered to make some provision for her; but there is no other reported case which shews any exception from the general rule. In *Winstone* v. *Winstone* (2) a petition for permanent alimony after a decree nisi was ordered to be taken off the file.

[JESSEL, M.R. I do not understand that case.]

In the present case the President thought that there were circumstances adverse to the wife, for that the defence had been vexatious. An order can be made after decree and need not be applied for at the time: *Bradley* v. *Bradley* (3); but according to rule 95 of the Probate and Divorce Division, the petition ought to have been presented within a month from the decree nisi, and an application at this distant period is not within the terms of s. 32 of the Divorce Act, 1857, which empowers the Court to make the order "on" the decree.

(1) 2 Sw. & T. 392. (2) 2 Sw. & T. 246.
(3) 3 P. D. 47.

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The Court directed the appeal to stand over that they might consult the President as to the grounds of his decision.

Mar. 3, 1883. JESSEL, M.R. We have communicated with the learned President, and he has informed us of his reasons for refusing this application.

In the first place it appears that there is no instance of an application of this nature being made at so late a period as the present application. Whatever meaning may be given to the word "on" in the Act of Parliament, it is very difficult to extend it to above a year. It is not necessary to express an opinion as to what time should be allowed, but it is not to be conceived that a period of more than a year can be included in the word "on." "On," if not confined to the time of making the decree, must mean shortly after.

But the learned President also decided the case on the merits. Now under the 32nd section the practice seems to have grown up of not allowing maintenance to the guilty wife unless a special case is shewn. I am not prepared to say on the present occasion that this is the correct rule. I am not going to lay down that it is not. I should require further consideration and argument before doing so, but it appears to me that the 32nd section of the Act has left an absolute discretion in the Court. I think that there was a good reason for doing so. When a divorce could only be obtained by Act of Parliament, it was in practice only obtained by wealthy persons, because it was very expensive, and it might well be considered right that where a wealthy man obtained a divorce from a wife who had no means of subsistence, he should, as a condition of his being granted that divorce, be compelled to make some provision for her, so that she should not be allowed to starve. But the Divorce Act was meant to apply not only to wealthy people, but to all people, and indeed one of the strong grounds for passing it was that under the then system the wealthy alone could obtain a divorce. It was thought that this was not a right state of things, and consequently the remedy was made less expensive so that all classes might be able to resort to it. Now in the case of people of small means very different considerations arise. When a working man who has married a

washerwoman obtains a divorce, she can very well go to washing again. That is quite a different case from that of a gentleman of large means who obtains a special privilege by Act of Parliament. I should be inclined to say that where a wealthy gentleman obtains a divorce the Court, in acting under s. 32, ought to act on a rule somewhat similar to that established in the House of Lords under the old practice, for the reason of the thing appears to be the same, but we are not to be considered as finally deciding the point, or as laying down any rule for the guidance of the Divorce Court. I am only stating my present impression that the Court, under s. 32, has full discretion, and is under no obligation to require special circumstances to be shewn to entitle the guilty wife to some provision.

In this particular instance the learned President came to the conclusion that not only was there no special case entitling the wife to a provision, but that there was on the contrary a reason which disentitled her to the payment. He, of course, was familiar with the case from beginning to end, and the view he took of it was this. He said that there appeared to have been some arrangement made that the wife should withdraw her denial of her guilt, and that the husband should make some provision for her, but that before the trial that arrangement fell through, and the wife insisted upon the fact of the adultery being proved against her. The adultery had taken place in Italy, and it was very difficult and expensive to prove it. The ultimate result was that the husband, whose means were but moderate, was put to an expense of about £3000. The learned President thought that as the wife had thus taken away almost the whole of the husband's then property, it was not reasonable that he should be obliged to make any provision for her.

Now considering the learned Judge's acquaintance with all the facts, and his great experience in these matters, we should be very slow indeed to interfere with his discretion, either as regards enlarging the time or as regards the circumstances which in his opinion disentitled the wife on the merits to any allowance, and therefore it appears to me that we ought not to interfere.

LINDLEY, L.J. I agree. The question whether what we under-

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stand to be the ordinary practice in the Divorce Court is right or wrong is to be considered as left an open question; but I am not prepared to dissent from the conclusion of the President on the present occasion.

BOWEN, L.J. I agree.

Appeal dismissed.

Solicitor for Mrs. Robertson: *Warner Temple.*
Solicitors for Mr. Robertson: *Waddilove & Nutt.*

H. C. J.

March 12.

[IN THE COURT OF APPEAL.]

ROSE *v.* ROSE.

Cruelty—Condonation—Revival by subsequent Adultery.

A husband had been guilty of cruelty. He and his wife separated under the provisions of a deed by which it was agreed that no proceedings should be taken by either party against the other in respect of any cause of complaint which had arisen before the date of the deed, and that every offence, if any, committed by either party against the other should be considered as condoned, and that in any proceedings by either party against the other in respect of any cause of complaint which might thereafter arise, no offence committed by either party before the deed should be pleaded or be admissible in evidence:—

Held, affirming the decision of the President, that subsequent adultery by the husband did not revive the wife's right to complain of the cruelty committed before the deed, so as to enable her to obtain a decree for dissolution of the marriage.

Whether adultery by a husband which has been condoned is a bar to his obtaining a dissolution on the ground of subsequent adultery of the wife, *quære.*

THIS was an appeal by Mrs. Rose from a decision of the President. (1)

Dr. Tristram, Q.C., and *Barnard*, for the appellant. It is admitted that after the execution of the separation deed the wife could not have sued for a judicial separation on the ground of the past cruelty, but the subsequent adultery revives it. The latter part of the covenant is void as against public policy, it is an agreement to keep back from the Court facts which would influence it in exercising the jurisdiction given to it by the 31st section of the Divorce Act, 1857. *Gandy* v. *Gandy* (2), relied on by the President, was not a case of condonation but of a

(1) 7 P. D. 225. (2) 7 P. D. 168.

covenant to pay money, which is quite a different case. It has always been the understanding in the Divorce Division that condonation will not prevent the Court from noticing an offence which is brought before it. Adultery by a husband however condoned will prevent him from obtaining a decree for dissolution.

C. A. Middleton, contrà, was not called upon, but he referred to *Rowley* v. *Rowley*. (1)

JESSEL, M.R. As was pointed out in *Besant* v. *Wood* (2), unless a married woman was allowed to contract herself out of her rights in the Divorce Court, no proceedings in that Court could ever be compromised, but must be fought out to the end. It is absurd to say that a married woman is competent to commence a suit but is not competent to compromise it. Having then power to compromise her right to bring a suit for judicial separation, she has, by the present deed, contracted that she will not in any suit enter into the conduct of her husband before the execution of the deed. This is, in my opinion, a perfectly binding agreement. It appears to me to be perfectly consistent with public policy to hold that there may be what, for want of a better term, I will call final condonation. In the old Ecclesiastical Courts condonation was never final, but I do not see that public policy is against final condonation, indeed I think that it is in favour of allowing it. That bygones should be bygones is as advantageous between husband and wife as between any other parties. The lady here made a final bargain that she would not take any proceedings against her husband in respect of past offences, nor plead any past offences in any proceedings as to subsequent offences. Now she turns round and says that she will repudiate one of the most important stipulations in the deed. I am of opinion that she cannot do this, and that the decision of the President is right.

We were referred to another doctrine: it is said that adultery by a husband, however condoned or got rid of by deed, would prevent his obtaining a decree for dissolution, and that this shews that condonation of matrimonial offences is not final. That question may come before the Court of Appeal, and I do not mean to give a concluded opinion upon it, but my present impression is that

(1) Law Rep. 1 H. L. (Sc.) 63. (2) 12 Ch. D. 605.

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adultery by a husband which has been condoned is not necessarily a bar to his obtaining a dissolution for adultery of the wife, and the point must be considered as open.

BAGGALLAY, L.J. The adultery of the husband since the deed of separation entitles the wife to a decree for judicial separation, and a decree to that effect has been pronounced by the President; but the object of her appeal is to obtain a decree for dissolution, on the ground of that adultery combined with cruelty before the deed. It is admitted that there has been no cruelty since the deed. The deed provides that no offence committed before the date of the deed shall be brought forward in any subsequent proceedings. Unless we hold this stipulation void, it is a bar to that which the appellant claims. If it had been established that the deed had been improperly obtained, the covenant would not stand in her way; but no steps have been taken to set aside the deed, nor does there appear to be any ground for doing so. It is suggested that the deed is against public policy, but I cannot see this. Such deeds have now been recognised by the Courts for many years, and I cannot see any reason for treating this deed as a nullity.

LINDLEY, L.J. The question really is whether the separation deed is binding or good for nothing. It is too late now to say that deeds of separation are invalid on grounds of public policy. The authorities are reviewed in *Besant* v. *Wood* (1), where it was held that a husband is entitled to specific performance of a contract by his wife that they shall live apart. After much controversy it is at last settled that a deed of separation is binding on the wife as well as on the husband, and *Gandy* v. *Gandy* (2) carries out this view. The present case is almost on all fours with *Rowley* v. *Rowley*. (3) Dr. Tristram argues that the covenant is against public policy, but I can see nothing in that objection when once the legality of deeds of separation has been established. This is not a case of mere condonation; it is a matter of express bargain.

(1) 12 Ch. D. 605. (2) 7 P. D. 168.
(3) Law Rep. 1 H. L. (Sc.) 63.

Middleton asked that the appeal might be dismissed with costs, and the costs set off against the costs of the suit, which the husband had been ordered to pay.

Dr. Tristram, contrà.

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JESSEL, M.R. It must not be supposed that in no case should we dismiss an appeal by a wife with costs, and order them to be set off. In the present case an important point has been decided for the first time, and the wife has no private fortune. The appeal will be dismissed without costs.

Appeal dismissed.

Solicitors for appellant: *Hicklin & Washington.*

Solicitor for respondent: *W. Doveton Smythe.*

H. C. J.

BLOXAM AND OTHERS *v.* FAVRE AND OTHERS.

March 6.

Will—Execution—Alien—24 & 25 Vict. c. 114, and Naturalization Act, 1870.

A will made according to the forms of English law by an alien who, though her domicile of origin was English, was domiciled abroad at the time of making her will and of her death, is not entitled to probate in this country.

In determining what is the valid will of an alien, the general principles of law prior to the passing of the Naturalization Act, 1870, are still applicable.

In this case the plaintiffs as executors propounded a will dated the 5th of September, 1876, of the Baroness Caroline von Buseck von Altenbuseck, late of Homburg, in Germany, widow, who died on the 28th of July, 1880. The case came before the Court on an ex parte motion on the 3rd of August, 1881. (1)

The statement of claim alleged (amongst other matters) that the deceased was by birth a British subject, that her domicile of origin was English, and that she married in 1857 a German subject, namely, Baron John Charles Frederick William von Buseck von Altenbuseck, and thenceforward resided in Germany. That the Baron von Buseck died in 1873, and that the deceased being then resident in Germany made the will in question in the form required by English law.

The statement of defence alleged (amongst other matters) that the deceased on her marriage became a German subject and so

(1) Law Rep. 6 P. D. 211.

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remained until her death, and that the will was not made according to German law, and was therefore invalid. To this the plaintiffs demurred.

Feb. 23. *Jeune*, in support of the demurrer. By Lord Kingsdown's Act (24 & 25 Vict. c. 114 (1)) a British subject might dispose of property by a will made either according to the law of the place or the law of the domicile or the domicile of origin; and by the Naturalization Act, 1870 (33 Vict. c. 14), s. 1, personal property may be disposed of by an alien in all respects and in the same manner as by a British subject. By s. 10, sub-s. 2, of that Act the deceased on widowhood became a "statutory alien," and doubtless but for s. 2 her will would not have been valid, but that section, which gave her the same powers of disposition as a British subject, gave her the powers conferred upon such persons by Lord Kingsdown's Act, i.e., amongst others, the power of making a will according to the forms required by her domicile of origin. The words in s. 2 that a title may be derived through an alien refer to a disposition by will, otherwise the words would have no effect, as the right to acquire and hold property had been previously conferred upon aliens by 6 & 7 Vict. c. 66, s. 4. There is nothing unreasonable in giving a foreigner such a power: on the contrary it would in many cases be most useful, as, e.g., in the case of foreigners temporarily resident here.

Inderwick, Q.C. (*A. Gordon*, with him), contrà. The Naturalization Act, 1870, cannot have been intended to take the words "British subject" out of Lord Kingsdown's Act, otherwise more precise words would have been used. One object of the words relied upon in that Act may have been to give an alien the power which he did not possess before of dealing with chattels real. In construing statutes it must always be presumed that the legislature did not intend to exceed its jurisdiction and to violate the jus gentium: Maxwell on The Interpretation of Statutes, p. 122; *The Le Louis* (2); *In Re Cigala's Settlement.* (3)

Jeune, in reply.

Cur. adv. vult

(1) This and the other sections of the Acts of Parliament referred to are set forth in the judgment.

(2) 2 Dod. 239.

(3) Law Rep. 7 Ch. D. 351.

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March 6. SIR J. HANNEN. The plaintiffs in this case propound as executors an alleged will of the Baroness von Buseck. The declaration states that she was by birth an English subject, and had her domicile of origin in England. She married a German subject, and on her marriage went to reside in Germany. Her husband died in 1873, and in 1876, she, being still resident in Germany, made her will there in the form required by English law. It is not alleged in the pleadings, but it was admitted on the argument, that the deceased was from the time of her marriage until her death continuously domiciled in Germany.

The defendants have pleaded that the deceased on her marriage became a German subject and so remained till her death, and that the will propounded was not executed in the form required by German law.

To this the plaintiffs have demurred.

These pleadings do not accurately raise the question which was argued before me, and which I was called on to determine, that is, whether the will of an alien whose domicile of origin was English, but who was domiciled abroad at the time of the making of the will, and down to the death, is entitled to be admitted to probate in England, though the will be invalid by the law of the alien's domicile, if it is made in the form required by English law.

The principle which underlies the whole subject is thus stated by Mr. Justice Williams in his work on Executors, 6th ed. p. 351, 8th ed. p. 371. "It is now a clearly established rule that the law of the country, in which the deceased was domiciled at the time of the death, not only decides the course of distribution of succession as to personalty, but regulates the decision as to what constitutes the last will, without regard to the place either of birth or death, or the situation of the property at that time."

This was decided in the Privy Council in the case of *Bremer* v. *Freeman* (1), Lord Wensleydale there says, p. 358, "That the law of the testator's domicile at the time of making the will, and of the death of the testator, where there is no intermediate change of domicile, must govern the form and solemnities of the instrument, can no longer be questioned. The maxim mobilia sequuntur

(1) 10 Moore's P. C. 306.

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personam has long prevailed, and whatever the origin of that doctrine may be, whether it was derived from a fictitious annexation of moveables to the person or from an enlarged policy growing out of their transitory nature, it has (as Story, J., observes) so general a sanction among all civilised nations, that it may now be treated as a part of the jus gentium (Story's Conflict of Laws, s. 380). It follows from this maxim, that the post mortuary distribution of the effects of a deceased person must be made according to the law of his domicile at the time of his death, if he dies without a will, and it equally seems to follow that if the law of that country allowed him to make a will, the will must be in the form and with the solemnities which that law required, and it was so decided in the case of *Stanley* v. *Bernes* (1), which doctrine we believe has been generally approved," and he cites Story's Conflict of Laws, s. 468, where that learned author says that a will if void by the law of the domicile "is a nullity everywhere although it is executed with the formalities required by the law of the place where the personal property is locally situated."

The same doctrine was laid down in the House of Lords in the case of *Enohin* v. *Wylie*. (2)

If this will is admitted to probate it will be in opposition to the rule thus emphatically declared by the highest Court of Appeal in this country to be no longer open to question.

But it is contended that I am bound to admit it to probate under the provisions of one or other of two Acts of Parliament. The first of these is 24 & 25 Vict. c. 114, Lord Kingsdown's Act, by which it is enacted that "Every will made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of the making the same or at the time of his or her death) shall, as regards personal estate, be held to be well executed for the purpose of being admitted in England to probate, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of Her Majesty's dominions where he had his domicile of origin."

It is contended that this will must be admitted to probate

(1) 3 Hagg. Ecc. Rep. 373.

(2) 10 H. L. C. 1.

because it was made according to the forms required by the law of England where the testatrix had her domicile of origin.

But the answer to this argument is that the Act only applies to British subjects. No doubt the principle which was considered to justify the passing of that Act was that every country has a right to legislate with regard to its own subjects wherever they may be. At the time when that Act was passed the law of England was, or was supposed to be, at variance with that of every other European country on the subject of the status of a woman marrying an alien.

"In every country" says the late Lord Chief Justice of England, in his treatise on Nationality, p. 24, "except where the English law prevails the nationality of a woman merges in that of her husband, she loses her own nationality and acquires his, whereas by the law of England an Englishwoman marrying an alien still remains a British subject."

This state of the law, though not often of practical importance, might have led to the singular results pointed out by Sir A. Cockburn. His treatise was written "with a view to future legislation," and in the year following its publication the Naturalization Act, 1870, was passed; by the 10th section of which it is enacted: 1. "A married woman shall be deemed to be a subject of the State of which her husband is for the time being a subject. 2. A widow, being a natural-born British subject, who has become an alien by or in consequence of her marriage shall be deemed to be a statutory alien."

Having regard to this enactment, it seems to me clear that Lord Kingsdown's Act cannot apply to the case, since its operation is confined to the wills of British subjects. The deceased in this case was not at the time of making the will a British subject but an alien.

But s. 2 of the Naturalization Act, 1870, is relied on. By that section it is enacted that "real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject."

For the plaintiffs it was argued that the words "in the same manner in all respects" mean "according to the same forms,"

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and therefore that the same effect is to be given to the section as if there were added to it the words "notwithstanding any law of the alien's own country to the contrary."

It was contended that this was not an unreasonable construction to put upon the Act having regard to the cases of which the present is an example to which it would be applicable.

It is to be remembered, however, that the Act is not applicable only to aliens who had their domicile of origin in England, it applies to any alien though he never had a British domicile. If the plaintiffs' argument is to prevail the will of such an alien if made in the English form must be admitted to probate though the tribunals of his own country may have pronounced against its validity.

It is further to be observed that the words "in the same manner in all respects," are repeated in the next sentence of s. 2. There is nothing in the context to shew that the same words are to receive different interpretations in two consecutive sentences.

If then in the first the words "disposed of in the same manner in all respects," means inter alia disposed of by will executed according to the forms of English law," it follows that where a derivative title to property is traced through, from, or in succession to an alien, that title or succession may be established according to the same forms as in the case of a British subject, and thus a marriage, solemnized in a form valid by English or Scotch law though invalid by the law of the alien's country, might form a link in the chain of title to property.

It was held by the Court of Appeal in *Sottomayor* v. *De Barros* (1) that the marriage in England of first cousins being aliens not domiciled in England, if forbidden by the law of their own country, is invalid here. Yet by the plaintiff's construction of the 2nd section a claim to property might be established through such a marriage, because the title may be derived "in all respects as through, from, or in succession to a natural-born British subject."

These results appear to me so unreasonable that I must reject the interpretation which leads to them, unless the words are

(1) 3 P. D. 1.

incapable of receiving a construction more in harmony with well-established principles.

Sir Benson Maxwell says, in his work on the Interpretation of Statutes, p. 122, that "every statute is to be so interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations or with the established rules of international law." This passage expresses the rule of construction which is applicable to the present case. I think that another very clear and satisfactory meaning may be found for the language used.

Formerly aliens were subject to great restrictions as to the enjoyment of property in this country, but by 7 & 8 Vict. c. 66, an alien was "entitled to take and hold by purchase, gift, bequest, representation, or otherwise, every species of personal property except chattels real, as fully and effectually to all intents and purposes, and with the same rights, remedies, exemptions, privileges, and capacities as if he were a natural-born subject of the United Kingdom." But an alien still remained incapable of holding real property or chattels real.

The object of the 2nd section of the Naturalization Act, 1870, was to do away with these remaining restrictions, and for this purpose the section is worded as it is, and made to extend to real and personal property of every description, that is, including chattels real.

The object of the enactment in question was to do away with the disabilities of aliens, and put them on the same footing as natural-born British subjects, so far as English laws were concerned but leaving them still subject to the laws of their own country, and the general principles of private international law on the subject of domicile, which have been recognised by our tribunals.

Domicile is in no way dealt with or referred to throughout the Act.

I am of opinion, therefore, that the words "disposed of in the same manner in all respects as by a natural-born British subject," do include a disposition by will, but that in determining what is the valid will of an alien the general principles of law laid down by the Privy Council and House of Lords must still be applied.

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For these reasons I hold that the will in this case is invalid and the demurrer must be overruled.

Solicitors for plaintiffs: *Paterson, Snow, & Bloxam.*

Solicitor for defendants: *G. E. Carpenter.*

R. A. P.

March 6.

IN THE GOODS OF MARY MELLOR.

Administration—Executrix de son tort—Creditor.

An executrix who, without having taken probate, had intermeddled in the estate of her testator died possessed of property belonging to him:—

Held, after citation of her next of kin and their non-appearance, that the representative of the testator was entitled as a creditor to a general grant of letters of administration of her estate.

WILLIAM MELLOR, late of No. 8, Delamere Street North, Ashton-under-Lyne, died, having made his will, and appointed his wife Mary Mellor, executrix, and William Taylor, and Thomas Newton executors, and named his wife universal legatee for life. William Taylor and Thomas Newton renounced probate of the will, and Mary Mellor, without having obtained probate, took upon herself the management of the estate and sold portions of it, and at her death the sum of 94*l.* 19*s.* 4*d.* belonging to her husband's estate remained in a bank in her name.

Mary Mellor died on the 4th of April, 1881, a widow, and intestate, without child or parent, leaving her two brothers her only next of kin and only persons entitled in distribution to her personal estate and effects. On the 15th of September, 1881, letters of administration with the will annexed of William Mellor, the testator, were granted to the applicant William Mellor, and thereupon the brothers of Mary Mellor were cited to accept or refuse a grant of letters of administration of her estate, or shew cause why the same should not be made to William Mellor.

Bayford, for William Mellor, moved for a grant of the estate of Mary Mellor to the applicant as the representative of William Mellor the testator, whose estate had been wasted by Mary Mellor. The applicant is a creditor of the estate of Mary Mellor.

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SIR J. HANNEN. As the next of kin of the executrix have been cited and have not appeared to shew any cause to the contrary, I think William Mellor may be considered as a creditor, and as such entitled to a grant of letters of administration of her estate.

Solicitors: *Bower, Cotton, & Bower.*

R. A. P.

THE RISOLUTO.

March 6.

Damage—Registrar and Merchants—Consequential Loss—Loss of Fishing—Evidence.

A French fishing brig of 142 tons, employed in the cod fishery off the banks of Newfoundland, came into collision on the 6th of July, 1881, with an Italian barque, and in consequence of the collision was compelled to put into port for repairs, but, her repairs having been completed, returned to the fishing ground before the close of the fishing season. In an action of damage instituted on behalf of the owners of the brig against the barque, the Court pronounced the barque solely to blame for the collision, and referred the question of damages to the registrar and merchants. At the reference the plaintiffs claimed 1200*l.* for demurrage of their vessel from the date of the collision to the 26th of August, 1881, the date of her return to the fishing ground, and of the amount so claimed, the registrar, by his report, allowed the plaintiffs 880*l.* as the loss sustained by the interruption of their fishing. The defendants moved the Court in objection to the report:—

Held, that the motion must be dismissed.

THIS was an action of damage instituted on behalf of the owner, master, and crew of the French fishing brig *Emma* against the Italian barque *Risoluto*, and her freight, to recover for the damages arising out of a collision between the two vessels on the 6th of July, 1881, when the *Emma*, whilst fishing on the Great Bank of Newfoundland, in the North Atlantic Ocean, was run into by the *Risoluto* and received such damage that she had to leave the fishing ground and put into port for the purpose of being repaired.

The action was defended by the owners of the *Risoluto*, and was heard on the 13th and 14th of March, 1882, and on the latter of these days the Court pronounced the collision in question to have been occasioned by the fault or default of the master and crew of the *Risoluto*, and for the plaintiffs' damages in consequence thereof;

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condemned the defendants and their bail in such damages, and referred the said damages to the registrar and merchants.

After leaving the fishing ground after the collision, the *Emma* had not again returned there or resumed her fishing until the 26th of August, 1881, and the solicitors for the plaintiffs in their claim on the reference, in addition to a total sum of 17,154 francs, 66 centimes, for and in connection with the repairs done to the *Emma*, at St. Pierre Miquelon, the port where she had put in after the collision, claimed an item of 30,000 francs (1200*l.*) for demurrage of the *Emma;* alleging that the same "was claimed on the basis of the loss of fish which average catches of other vessels shewed she would have taken from the 6th of July, 1881, the date of the collision, to the 26th of August, 1881, or 30,000 cod at an average of 1 franc per cod."

In support of the last mentioned item of the claim, affidavits were brought in, in which several owners of French fishing vessels of from 100 to 281 tons engaged in the cod fishing trade off the banks of Newfoundland, stated what they had ascertained from the books kept on board their vessels for making daily entries of the fish taken, to have been the number of fish taken by each respective vessel from the 6th of July, 1881, to the 26th of August in the same year; the number of fish so stated to have been taken varying from 51,000 to 25,000.

In an affidavit filed on behalf of the defendants, their agent in England deposed to the effect that during the cod fishing season, from the end of April to November, a vessel of the tonnage of the *Emma*, and with a crew of twenty men engaged in the cod fishing on the banks of Newfoundland, in order to pay the expenses of the ship during the time she was absent from her home port, ought, according to ordinary calculation, to catch 60,000 fish of the value of 60,000 francs; that in this calculation the share of the crew customarily reserved to them had been included, but the interest on the ship and her equipment, and depreciation by wear and tear had not been taken into consideration, and that in the result the profits made by the vessels engaged in the Newfoundland cod fishery did not exceed the ordinary profits made by similar sized vessels when engaged in other trades.

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On the 4th of August, 1882, the reference came on for hearing, and the owner of the *Emma* was examined on behalf of the plaintiffs in support of the claim. He stated that the *Emma* had left St. Pierre Miquelon for what is called the first fishing on the 24th of April, 1881; that between that time and the 20th of June, 1881, she had had to return to that port, and had lost some days of the fishing season before the collision, and that after the repairs rendered necessary by the collision had been completed she had gone back to the fishing banks, arriving there on the 26th of August, 1881.

After hearing the solicitors for the plaintiffs and defendants, the registrar reported that there was due to the plaintiffs the sum of 1473*l.* 16*s.* 5*d.* together with interest, and that he was of opinion that the plaintiffs were entitled to the costs of the reference.

From a schedule annexed to the report it appeared that out of the total amount allowed by the registrar, the sum of 14,845 francs 51 centimes had been allowed in respect of the repairs done to the *Emma* and incidental expenses, and that instead of the sum of 30,000 francs claimed for demurrage as above mentioned, the registrar had allowed the following item: "Demurrage of the *Emma* from the 6th of July, 1881, to the 26th of August, 1881, 22,000 francs." It further appeared from the schedule that for the purposes of the report 25 francs had been taken as equivalent to one pound sterling.

The following notes on the case at the reference and the decision of the registrar were drawn up by Mr. Cockell, one of the clerks in the registry, for the use of the Court.

"This was a claim by the owner, master, and crew of the French fishing-vessel *Emma*, of 143 tons, against the Italian barque *Risoluto*, arising out of a collision at Newfoundland. The claim was for cost of repairs at St Pierre Miquelon, an island belonging to France, off the south coast of Newfoundland, and also for loss of cod-fishing from the 6th of July, 1881, the date of the collision, to the 26th of August, 1881.

"Proceedings were commenced in this Court by the arrest of the Italian vessel on her arrival at Sharpness, Gloucester. Judgment was afterwards given in favour of the plaintiffs, and on the 4th of August, 1882, the case came before the registrar, assisted by Mr.

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Young and Mr. Sellar, for assessment of damages. Mr. Pourpoint, the owner of the *Emma*, on behalf of the plaintiffs, and Mr. Carter, a London shipwright, on behalf of the defendants, were examined as witnesses. Mr. Carter had been sent to Dieppe on behalf of the defendants to examine and report upon the repairs which had been done to the *Emma* at St. Pierre, six months before. Only one bill relating to the repairs, was produced, namely, that of the owners themselves, who have a house of business at St. Pierre Miquelon as well as at Dieppe; it should also be observed that in addition to the various items disallowed by the registrar, amounting to 1797 francs, a further sum of 960 francs had been taken off by the plaintiffs' solicitor, being payments for assisting in and about the repairs made to the crew, who refused to work without additional remuneration, and with whom there had been some trouble.

"A sum of 22,000 francs was allowed for loss of fishing. The vessel had a crew of twenty men and eight small boats, it being the practice for the boats, with two men in each and long lines, to surround the vessel whilst fishing. An immense number of French as well as native and somewhat smaller vessels are engaged in the trade, some of them landing their fish from time to time, and others, including the *Emma*, taking everything they catch to Bordeaux, receiving a bounty for so doing from the French Government. The cod fishery opens late in April and ends in November. The *Emma* had left Dieppe as usual about the middle of March, with the necessary salt to preserve the fish to be caught by her, going straight to St. Pierre, to procure herrings as bait for the early fishing, and afterwards having damaged her windlass she had returned to St. Pierre, and having got a supply of bait for the later fishing had only just resumed fishing when the collision in question occurred. At the close of the season she proceeded to Bordeaux and landed and sold 36,474 cod, which realised 37,855 francs. It was proved that the average number of fish caught by other vessels in those seas greatly exceeded that quantity, and that unless that was the case, the proceeds would not cover the expenses. The registrar and merchants therefore came to the conclusion on the information furnished especially by the defendants, that 22,000 francs should be allowed as the

loss sustained by the interruption to the fishing occasioned by the collision, an allowance for demurrage in the usual way being inapplicable to this case."

On the 9th of August, 1882, the solicitors for the defendants filed in the registry a notice of objection to the report, and having obtained the consent of the plaintiffs to the objections being taken on motion, subsequently gave notice that the judge in Court would be moved to direct the registrar's report to be amended by reducing the allowance in the matter of demurrage, on the ground that the amount allowed was unreasonable, and such as was not usually allowed by the registrar, and that the rate and time allowed for demurrage was excessive, and that the evidence did not warrant the sum allowed in respect of the said item.

March 6. 1883. *Bucknill*, on behalf of the defendants, in support of the motion. In actions of damage where compensation for detention during repairs has been successfully claimed in the registry, the usual practice of late years has been to allow demurrage according to a customary rate per ton per diem, and in cases where this course has not been adopted the practice has been to estimate what profits would most probably have been obtained if there had been no collision. In order to enable the registrar and merchants to estimate what such profits would have been in the present case, the plaintiffs ought to have shewn on the reference what net profits had been earned by the *Emma* herself whilst engaged in the cod fishing during July and August in years prior to 1881. This they did not do, but merely produced on the reference evidence as to the average number of cod taken during the season of 1881 by various other vessels not of the same tonnage or even manned by the same number of men. On this speculative evidence the registrar appears to have based his decision, and on this ground alone, even assuming that the rate of demurrage to be allowed in cases of fishing vessels is to be different from the rate allowed in other cases, it is submitted that the report ought to be amended. [He referred to *The Gleaner*. (1)]

(1) 38 L. T. 650.

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W. G. F. Phillimore, on behalf of the plaintiffs, opposed the motion. The right of the persons interested in a fishing vessel damaged by a wrongdoer to recover in an action of damage consequential damages, where, in consequence of the collision, a fishing adventure has been interrupted, has been recognised in many decided cases, of which the case of *The Clarence* (1), which came before Dr. Lushington in 1850, is one. The registrar and merchants have acted in accordance with the principles of these cases, and have allowed a fair and reasonable sum in respect of the detention of the *Emma*. In order to guide them in estimating the amount of this sum they had before them evidence on affidavit put in by the defendants, as well as the evidence adduced by the plaintiffs. Moreover, it is now too late to object to the admissibility of evidence admitted without objection at the reference.

SIR ROBERT PHILLIMORE. I do not think I need further trouble the counsel for the plaintiffs. Looking to all the circumstances of this case, and to those authorities which have been referred to, and to others which exist and might have been cited in favour of the plaintiffs, and having read Mr. Cockell's notes on the case, I am of opinion that I ought not to interfere with the report of the registrar, and I therefore dismiss the motion with costs. (2)

Solicitors for plaintiffs: *Stokes, Saunders, & Stokes.*
Solicitors for defendants: *Thomas Cooper & Co.*

(1) 3 Wm. Rob. 283, 286.

(2) The minute of the order subsequently entered in the registry was as follows: The judge having heard counsel for the plaintiffs and the defendants overruled the defendants' objections to the registrar's report, confirmed the said report, and condemned the defendants and their bail in costs.

G. B.

[IN THE COURT OF APPEAL.]

1883
April 20.

THE RENPOR.

Life Salvage—No Res saved—Right of Salvors to bring Action—Validity of Salvage Agreement.

A steamship was requested by another steamship in distress to stand by her. An agreement was accordingly made between the two masters for a fixed sum that the sound vessel would remain by the damaged one till she was in a safe position to get to port. The sound vessel remained by the damaged one until the latter was about to sink, when she took her crew on board, and the damaged steamer immediately afterwards sank. The owners, master, and crew of the salving ship brought an action for life salvage:—

Held, that as no res was saved the action would not lie either as a salvage action simply or on the agreement.

Observations of Brett, M.R., as to the implied authority of shipmasters to enter into salvage agreements.

ACTION for life salvage by the owners, master, and crew of the s.s. *Mary Louisa* against the owners and master of the s.s. *Renpor*. It appeared from the statement of claim that on the 13th of April, 1882, whilst in the midst of a great ice-field, the *Mary Louisa* came up with the *Renpor*. The *Renpor* was exhibiting signals of distress. She was laden with a heavy cargo of pig-iron and potatoes; her starboard bow had been stove in below the water-line by the ice, and the water was gaining on the pumps. The crew were worn out by exposure and exertion, and the *Renpor* was in danger of sinking. The master of the *Renpor* asked the master of the *Mary Louisa* to remain by him, and the latter consented to do so if the master of the *Renpor* would enter into a written agreement, which he did. The agreement was as follows: "*Mary Louisa*, April 13, 1882. It is hereby agreed between Thomas Gibb, master of the above steamer, and Robert Osborn, master of the s.s. *Renpor*, that the above steamer *Mary Louisa* agrees to stay by me until I am in a safe position to get to port for the sum of 1200*l*., my vessel being badly holed in starboard bow, near collision bulkhead." The *Mary Louisa* remained by the *Renpor* during the night, and the next morning, as the *Renpor* proved to be sinking, took her crew on board, and the *Renpor* shortly afterwards sank.

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Demurrer to the statement of claim on the ground that the agreement had not been performed, and that no cause of action had arisen on it; that no action for salvage would lie, as no property of the defendant had been saved.

On the 2nd of August, 1882, Sir R. J. Phillimore gave judgment, upholding the demurrer. The plaintiffs appealed.

A. Charles, Q.C., and *G. Bruce*, for the plaintiffs. The services were rendered by request. There is a distinction between services rendered on request and rendered voluntarily, and for the former, though no property is saved, the salvors are entitled to be rewarded. If there is a contract, it is immaterial if the res is saved or not. [They referred to *The Undaunted* (1); *The E. U.* (2); *The Medina* (3); *The Aztecs* (4); *The Cargo ex Schiller* (5); *The Fusileer* (6): Clark's Praxis, ch. 25. They also argued, on the construction of the agreement, that the plaintiffs were entitled to recover the sum mentioned therein.]

[BRETT, M.R., referred to *The Johannes.* (7)]

W. G. F. Phillimore, for the defendants, was not called on.

BRETT, M.R. In this case the judgment of the Court below must be affirmed. The suit is brought under the following circumstances: the *Renpor* was in the greatest possible danger, she was in the ice, she could not move out of it, and she was 1000 miles from land, when the *Mary Louisa* came up with her. The *Renpor* very shortly sank, but before that happened the *Mary Louisa* saved the lives of her crew. The plaintiffs' vessel whilst rendering this service was in considerable danger, and there were therefore several of the elements present of a salvage service, namely, danger to the lives and property both of salvors and salved and a service rendered. It is then said that the action is maintainable irrespective of any agreement as a life salvage service. As I have already said there were several of the elements present

(1) Lush. 90.
(2) 1 Spinks, 63.
(3) 2 P. D. 5.
(4) 3 Mar. L. C. 326.
(5) 2 P. D. 145.
(6) Br. & L. 350.
(7) Lush. 182.

which entitle persons to salvage, but there is one element invariably required by Admiralty law in order to found an action for salvage, there must be something saved more than life, which will form a fund from which salvage may be paid, in other words, for the saving of life alone without the saving of ship freight or cargo salvage is not recoverable in the Admiralty Court. Life salvage it is true may by statute be payable under some such circumstances, but then it must be paid by the Board of Trade. It is said that under some circumstances if life is saved after the services of the salvors have been requested by the master of the ship which is in danger, the shipowner is bound to pay salvage, although there is no res saved, and *The Undaunted* (1) has been cited in support of this proposition. *The E. U.* (2) has also been relied on as an authority in favour of it, more especially a dictum of Dr. Lushington which is to be found in that case. But *The Undaunted* (1) is really no authority in favour of the plaintiffs' contention, because in that case the ship was saved, and therefore there was a fund from which payment could be made. The question was there raised whether the plaintiffs could be paid out of that fund, and it was decided that they could, because they had exerted themselves to save the ship at the request of the master. It is unnecessary for us to say if we agree with that decision, but it in no way broke the fundamental law of the Admiralty Court, that something must be saved in order to give valid grounds for a salvage action. *The E. U.* (2) is a similar case, but there a supposed case is mentioned by Dr. Lushington which is said to support the plaintiffs' contention in the present case. If Dr. Lushington did state this supposed case as containing his view of the law, it is contrary to what he had laid down before, and if it does, with all respect for his great authority, I am unable to agree with it. But I doubt if it is an exact statement of that learned judge's opinion, and the cases of *The Fusileer* (3), *The Zephyr* (4), and the *Cargo ex Schiller* (5), are contrary to it, and support the rule that some property must be saved to give rise to a claim for salvage.

(1) Lush. 90.
(2) 1 Spinks, 63.
(3) Br. & L. 350.
(4) 2 Hagg. 43.
(5) 2 P. D. 145.

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Then it has been argued that an action in the nature of a common law suit can in this case be supported on the agreement, which, it is said, is binding on the shipowner. But there are two circumstances necessary in order to make an agreement binding on an owner; first, the contract must be made under a necessity; and secondly, it must be made for his benefit. I do not desire to say anything which may seem cruel, but I must express a doubt whether if an agreement is made only for the purpose of saving a master and a crew without regard to any saving of the property of the shipowner, though it be in a case of necessity, yet as the subject-matter is without benefit to the property of the shipowner, the master has authority to bind the owner to a money payment. But if this agreement was not merely one by which the lives of the master and crew were to be saved, what does it mean? The contract must be read having regard to the circumstances, and the parties to it; it is idle to suppose that those on the *Renpor* had made up their minds that the ship would sink at once, "We" and "I" clearly mean the "ship" and "us," the ship and the crew are treated as one thing. Thus it is a contract which the master would have authority to make and by which the owner would be bound to pay the sum mentioned in it for staying until the ship was safe. Any question of a quantum meruit claim arising out of it is one which, though mentioned during the discussion of the case, cannot be seriously argued.

I think, therefore, that the agreement is a proper salvage agreement; it fixes the amount of salvage to be paid both for services to life and property, but leaves untouched all the other conditions necessary to support a salvage award. As therefore both on principle and on the construction of the contract itself there must be something besides life saved to make it effectual, I am of opinion that neither owners nor master are liable in this action because no res has been saved.

COTTON and BOWEN, L.JJ., concurred.

Appeal dismissed.

Solicitors for appellants: *Pritchard & Sons.*

Solicitors for respondent: *Ingledew & Ince.*

E. S. R.

THE GEORGE ROPER.

1883
April 27.

Collision—Launch—Duty of Tugs in the Mersey.

Persons in charge of a launch are bound to take the utmost precautions to avoid injury to passing vessels, such precautions being in the circumstances no more than reasonable. It is their duty to have a tug in attendance on a launch in the Mersey, decorated so as to indicate that a launch is imminent, and, if necessary, to warn approaching vessels.

ACTION for damages by collision.

The plaintiffs' steamer the *Bentinck*, was coming down the river Mersey, a little on the Cheshire side of midchannel, and after manœuvring to avoid a steamer, those on the *Bentinck* saw a launch, the *George Roper*, coming across the river about 300 yards off, stern first. The engines of the *Bentinck* were ordered full speed astern, but the *George Roper* struck the stem of the *Bentinck*. It appeared that the *George Roper* had two tugs in attendance, one out in the river from which a burgee forty-three feet long was flying, but which had on board no other indication that a launch was about to take place.

Russell, Q.C., and *Phillimore*, for the plaintiffs.

Myburgh, Q.C., and *Bucknill*, for the defendants.

[*The Andalusian* (1), and *The Blenheim* (2), were cited during the case.]

The essential facts of the case, and the points decided, sufficiently appear from the following judgment.

BUTT, J. This case does not present much difficulty. I and the Elder Brethren, take the same view. The first question is as to the duty of those in charge of a launch, and this is laid down in the case of *The Andalusian* (3); as to this legal obligation, I am bound by that case, and moreover I quite agree with the law as there enunciated. The rule is thus stated: "the law throws upon those who launch a vessel the obligation of doing so with the utmost precaution, and giving such a notice as is reason-

(1) 2 P. D. 231. (2) 2 Wm. Rob. 421.
(3) 2 P. D. 231.

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able and sufficient to prevent any injury happening from the launch, and moreover the burden of shewing that every reasonable precaution has been taken and every reasonable notice given, lies upon her and those managing the launch."

Mr. Myburgh said that this comes to a question of reasonable precaution, as no one is bound to do more than take reasonable precautions; but this is really no more than a change of terms. For reasonable precaution is, in fact, the utmost precaution under such circumstances. When you set a vessel of large size, without engines and without a helm, and with only a tug to manage her, off the ways at a speed of seven knots across the fairway of the river Mersey, the utmost precautions are certainly only reasonable. What then are the usual precautions? We know that one thing is to have a tug decorated with a string of flags. This is well known, certainly to all seamen, to mean that a launch is taking place, and I cannot think why these precautions should not have been taken in this instance. I am of opinion that they should be taken in all cases of a launch in the Mersey, but here the defendants chose to trust to something else. Properly enough, no doubt, there were two tugs in attendance, one at the yard and one out in the Mersey. As to the decoration of the tugs, Mr. Potter, one of the defendants, himself says, that he thinks it is the custom to have more flags than one to shew that the tugs are not employed in the ordinary way, and if this had been done it is clear the collision would not have taken place. In *The Andalusian* (1) it was held that the tug should give warning. What then is the state of things here? The *United States*, the tug out in the river, sees three vessels coming down a mile off. She knows the launch is likely to come across their course, but as they get nearer she takes no steps to warn them or the launch, and this appears to me to be a clear neglect of duty, for this tug might have steamed up and given warning to the approaching vessels. It further appears that Mr. Potter went to a place where he could see if the river was clear in the immediate vicinity, then descended to the platform; and within two minutes the launch was in the water. Mr. Potter was unaware that three vessels were coming down the river towards the place where the launch would

(1) 2 P. D. 231.

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reach, and not knowing this, he gave the order for the launch to be let go. Both the tug masters, however, were aware that three vessels were under way down the river, but they did nothing, and this, as I have said, is a neglect of duty. Moreover I consider it is negligence on the part of those in charge of a launch, to set the vessel going on the ways without taking every possible step to assure themselves that nothing is approaching the place of the launch at the time.

[The learned judge then considered whether there was any negligent navigation in fact on the part of the *Bentinck*, and deciding that there was none, pronounced the *George Roper* to be alone to blame.]

Solicitors for plaintiffs: *Hill, Dickinson, & Co.*
Solicitors for defendants: *Bateson & Co.*

E. S. R.

[IN THE COURT OF APPEAL.]

April 25.

THE LEON XIII.

Wages—Foreign Ship—Protest by Foreign Consul—Discretion of Court.

In an action for wages and damages for wrongful dismissal by British seamen who had served on a Spanish ship under Spanish articles, the Spanish consul at Liverpool protested against the exercise of the jurisdiction of the Court, and the Court accordingly dismissed the action:—

Held, on appeal, that to enable the Court of Appeal to overrule the discretion of the Court below as to entertaining the action, the judge must be shewn to have exercised it on wrong principles or wrongly or unfairly.

Held, further, that though no express provision of the Spanish code was referred to in the articles, and though it did not appear in evidence that the Spanish code compelled the seamen to abide by the decision of a Spanish tribunal, yet that, under the circumstances, it must be inferred that they had agreed to do so.

ACTION for wages and wrongful dismissal. The plaintiffs, in November, 1881, engaged themselves on board the Spanish ship *Leon XIII.* on a voyage from Liverpool to Manilla and back, and signed articles at Barcelona.

On the 21st of December the plaintiffs alleged that being then at Aden they were wrongfully put in confinement by the master

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and detained till the arrival of the ship at Manilla on the 27th of March, when they were wrongfully dismissed the ship. It further appeared from affidavits subsequently filed in the action, that a writ of habeas corpus was issued from the British Court at Singapore to decide as to the propriety of the plaintiffs' imprisonment, but that the master caused the *Leon XIII.* to be taken from Singapore and to sail for Manilla without obeying the writ, for which he was sentenced to six months' imprisonment by the Chief Justice of Singapore. After the issue of the statement of claim, the Spanish consul at Liverpool made a protest against the exercise of the jurisdiction of the Court. The main grounds on which this protest were based were that the *Leon XIII.* was a Spanish ship, that the articles of agreement were in the Spanish language, and signed before Spanish officials at Barcelona, and that they constituted the form of agreement prescribed and recognised by the Spanish law. By the 5th paragraph of the protest the consul alleged as follows:—

"The plaintiffs in this action have, by the terms of their agreement and by the law of Spain, submitted themselves to the provisions of the same law by which the plaintiffs are restricted from taking proceedings against the said vessel or her owners in countries other than Spain, or her colonies, or Spanish colonies, and are required to submit any dispute or claim such as that raised in this action respecting the voyage in the said articles mentioned, or against the owner of or master of the said vessel, to the Spanish authorities in Spain, or in foreign countries to the Spanish consuls."

The plaintiffs in their affidavit simply traversed the allegations contained in the protest of the Spanish consul.

On the 7th of November, 1882, Sir R. J. Phillimore, on the defendants' motion, dismissed the action.

The plaintiffs appealed.

1883. April 25. The appeal came on for hearing before Brett, M.R., and Bowen, L.J.

Aspinall and *French*, for the plaintiffs, argued that the learned judge below had exercised his discretion wrongly in not enter-

taining the action. The case differs from *The Nina* (1), where there is no allegation of any wrong done to the seamen, it was there a mere question of the right to wages. In *The Nina* (1) there was an express contract by which the seamen agreed to have disputes tried by a Portuguese tribunal, here it is only inferred that they submit to Spanish law. [They referred to *The Golubchick* (2); *The Jerusalem* (3); *The St. Olaff* (4); *Limland* v. *Stephens.* (5)]

Reid, Q.C., and *Phillimore*, for the defendants, were not called on.

BRETT, M.R. In this case an action was brought against the defendant's ship and cargo in the Admiralty Court by certain engineers who had served on board the ship. The action was brought to recover wages due, compensation for wrongful dismissal, and perhaps to recover damages for alleged false imprisonment. I say "perhaps," because it must be noticed that in the statement of claim there is no prayer for damages for false imprisonment, unless it is to be considered as included in the prayer for general relief. The suit then having been thus instituted, a protest is presented by the Spanish consul at Liverpool, which is in effect an assertion that the dispute ought to be tried by the Spanish consul, and though there is some alleged difficulty as to what consul is meant by the protest, it is clear that it means the Spanish consul at Liverpool, that is to say, at the place where the ship was seized and the dispute arose. The consul's protest was supplemented by his affidavit, and both protest and affidavit alleged these grounds, that although the plaintiffs were British sailors yet that they entered into a contract with the master of a Spanish ship, and that such contract was made in a Spanish port. I think this latter fact immaterial, for the plaintiffs have entered into a contract to serve on board a Spanish ship and nowhere else. The consul also alleges facts by way of evidence, namely, that the contract is a Spanish contract, in the Spanish language, and in the form of Spanish articles, all being strong,

(1) Law Rep. 2 Ad. & E. 44; 2 P. C. 38.
(2) 1 Wm. Rob. 143.
(3) 2 Gall. 191.
(4) 2 Peters, 428.
(5) 3 Esp. 268.

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indeed I may say conclusive, evidence that the contract was a Spanish contract of service. He goes on to state that a Spanish seaman so serving is liable in case of a dispute between him and the ship-owner to have it settled by Spanish law; and by Spanish law, persons in the position of the plaintiffs can only have the case settled before a Spanish Court or a Spanish consul abroad, meaning thereby, as I have said, the consul at the place where the dispute arises. To this protest and affidavit, there is no answer by affidavit that the Spanish consul's statement of the law is erroneous, and under these circumstances, the learned judge of the Admiralty Court, held in obedience to the decision of Dr. Lushington and the Privy Council, that though he had jurisdiction to try the action, yet that he had a discretion to exercise in respect of it, namely, to decide whether he should try it himself or leave the parties to go before the Spanish consul. This, then, is an appeal on the ground of an erroneous exercise of his discretion against the decision of the learned judge in dismissing the action. The learned judge states that he gave his decision first on the ground that a man "must be considered pro hac vice to be a subject of that country to which the vessel belongs," and next, he says, that "upon the whole, without entering into the cases which are fully considered and the principles of law applicable to them in the case of *The Nina* (1), I am of opinion that no difference is established between them and the present, and I must dismiss this suit," meaning that there is no difference between this case and the principles of law acted on in former cases. These principles are distinctly stated in *The Nina* (1) and *The Golubchick* (2), and it is clear that the Court, though there is express provision in the articles that seamen bind themselves to go before the tribunals of the country to which the ship belongs, is not ousted of its jurisdiction. But it is equally certain that though the Admiralty Court has jurisdiction, yet it will also exercise its discretion and consider if it will entertain the action or not. *The Nina* (1) lays down this ground to guide the judicial discretion—that if all the foreign consul does is to protest without giving reasons, then the Court of Admiralty will proceed with the action, but if

(1) Law Rep. 2 Ad. & E. 44; 2 P. C. 38. (2) 1 Wm. Rob. 148.

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he gives reasons then the Court of Admiralty will inquire into them and allow his allegations to be contradicted. When it has entered into the facts it will proceed to exercise its discretion. In the *Nina* (1) certain English sailors entered into articles on a Portuguese ship, they undertook to abide by the decision of a Portuguese tribunal, but there was no negative stipulation that they would not be bound by an English Court. There was then an affidavit of the consul that by Portuguese law these sailors could only proceed before a Portuguese tribunal. The Court of Admiralty held that though not bound to give up its jurisdiction, yet under the circumstances of such a protest it would decline to go further into the matter. The Court held that the fact of the sailors being British seamen would not cause it to entertain the action if being British seamen they had bound themselves by a foreign contract. The present case was rightly considered as if the seamen had been Spanish and the consul says that being such they can only complain to a Spanish Court or consul. He submits that the Court should not exercise its jurisdiction. In *The Nina* (1) the Court acted in accordance with the consul's wish, so here when the learned judge says I abide by *The Nina* (1), he means these engineers are to be considered as Spanish sailors, and he thinks the consul's protest a proper one. It is then said that the learned judge has exercised his discretion wrongly. What then is the rule as regards this point in the Court of Appeal? The plaintiffs must shew that the judge has exercised his discretion on wrong principles, or that he has acted so absolutely differently from the view which the Court of Appeal holds that they are justified in saying he has exercised it wrongly. I cannot see that any wrong principle has been acted on by the learned judge, or anything done in the exercise of his discretion so unjust or unfair as to entitle us to overrule his discretion. He acted expressly in accordance with *The Nina* (1), and I think the judgment is correct. Then it is asserted that the materials before the learned judge were erroneous, and that the consul's statement was an incorrect one of Spanish law; perhaps if this had been distinctly proved before us now we might have altered our opinion, but as the matter stands we have no materials before us

(1) Law Rep. 2 Ad. & E. 44; 2 P. C. 38.

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to shew that the consul's opinion is not correct, and although a long time has elapsed since the hearing of this case in the Court below nothing in the nature of evidence has been brought before us to support the assertion of the plaintiffs' counsel, and we are not bound to take their statement as to the contents of the Spanish code. There is no suggestion that an affidavit can be obtained. It is said there is no Spanish expert in London or any of the large English seaports. We cannot act on these suggestions. There is really no good ground advanced to show that we could have different materials before us. We are, in fact, powerless to overrule the learned judge, so that these men must go before the Spanish consul at Liverpool, and the appeal must be dismissed with costs.

BOWEN, L.J., concurred.

Appeal dismissed.

Solicitors for plaintiffs: *Pritchard & Sons.*
Solicitors for defendants: *Gregory & Co.*

E. S. R.

May 2.

THE MARGARET.

Collision—Thames Rules, No. 23.

A steamship the *C. S.* left the South West India Docks nearly opposite the curve of Blackwall Point, and proceeded down stream at easy speed against a flood tide. In a few minutes, as she was about to round Blackwall Point, she perceived the steamship *M.* in Bugsby's Reach, and preparing to round the point; the *C. S.* stopped and reversed her engines, but a collision between the *C. S.* and the *M.* took place:—

Held, that rule 23 of the Thames Rules did not apply under the circumstances to the *C. S.*

The Libra (6 P. D. 139) explained.

ACTION of damage. A collision occurred between the plaintiffs' steamship *Clan Sinclair*, and the steamship *Margaret* on the 9th of March, 1883, between 1.30 and 2 P.M. in the river Thames nearly off Blackwall Point. The *Clan Sinclair* left the South West India Dock, nearly opposite the curve of the point on the north

shore (1) of the Thames, about 1.30, and proceeded down river in tow of a tug at a speed of three to four knots through the water. The tide was flood running about two to two and a half knots and the weather was fine and clear. The *Margaret* was coming up river at a speed, as she alleged, of from five to six knots over the ground, and was in Bugsby's Reach when those on board saw, as they alleged, the masts of the *Clan Sinclair* over the land at Blackwall Point from half to three quarters of a mile off, and about three points on the port bow. It was alleged by those on board the *Clan Sinclair*, that at about 1.34 as the *Clan Sinclair* was in midchannel, and was about to round Blackwall Point under a port helm, they observed the *Margaret* over the land at Blackwall Point about a third of a mile distant, coming up the river and bearing three to four points on the starboard bow, and that the engines of the *Clan Sinclair* were stopped and then reversed, and the tow rope of the tug was slipped, but the *Margaret* struck the starboard side of the stem of the *Clan Sinclair*.

After the evidence had been taken,

Myburgh, Q.C., and *Hollams* (*Russell, Q.C.*, with them), for the plaintiffs, argued that No. 23 (2) of the Thames Rules did not apply to the circumstances of this case, nor did *The Libra* (3); even if the rule did apply, so far as was possible, the *Clan Sinclair* obeyed it.

Hall, Q.C., and *Phillimore*, for the defendants, urged that the *Clan Sinclair* was to blame for not complying with the Thames Rules, No. 23 (2), and that she should have stopped for the *Margaret* to pass her: *The Libra*. (3) They also commented on the evidence generally.

Myburgh, Q.C., replied.

BUTT, J. It is important to bear in mind that the *Margaret* is a small steamer of 253 tons and the *Clan Sinclair* a large one of

(1) The exact position of this dock and the course of the river which were material to the decision of this case can only be fully shown by a chart.

(2) Rule 23: "Steam vessels navigating against the tide shall before rounding the following points, viz. . . . Blackwall Point, ease their engines and wait until any other vessels rounding the point with the tide have passed clear."

(3) 6 P. D. 139.

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1911 tons nett and 355 feet in length. The latter came out of the South West India Dock, where the curve of Blackwall Point begins, and had to navigate down river against a flood tide with the assistance of a tug. It is urged that the *Clan Sinclair* is blameworthy for disobedience to rule 23 of the Thames Rules, and it is said that she broke this rule which is as follows. [The learned judge read the rule.] Now it is clear that this vessel never had her engines going at any other than an easy rate from the time she got into the river, so in one sense she had in fact easied, and was going down very slowly. Next, however, it is argued that this is not enough, and it is said that it has been judicially laid down that a vessel going down against the tide and meeting one coming up must easy and bring herself to a standstill, and so remain until the vessel coming up shall have passed her, or so far to a standstill that the vessel coming up shall pass her before she reaches the point. This argument is founded on a passage in the judgment of Brett, M.R., in the Court of Appeal, in *The Libra* (1), namely: "when it is likely that they will meet on the point, the vessel which is going against tide shall wait. I think that the meaning of that is, that she shall so far check her speed as to prevent her coming up to the point at the same time when the other vessel would come there. The vessel going against tide is not only to wait until the other has passed the point, but to wait until the other has passed her." Whether I agreed with this decision or not, I am clearly bound by it, but I do agree with it and I am not now going to depart from it. But the question is whether rule 23 is applicable to the circumstances of the present case. It certainly applies to Blackwall Point, but it contemplates two vessels in different reaches sighting each other across the point, or at any rate at a time when each is in a different reach; and it intends that the one coming down shall stop in the reach where she is till the other has passed her. This seems clear from the phrase which is used in the rule, viz. "before rounding the point." Now as I have already said, the *Clan Sinclair* had come out of the South West India Dock, and though she does not come out on the pitch of the point, yet she does so on the bend, where the river has begun

(1) 6 P. D. 139.

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to trend round, and unless she goes astern can never get in the position which is contemplated by the rule. Therefore she is neither within its letter nor its spirit. Yet if not in a position to comply entirely with the rule, she may still under the circumstances be bound to do what she can to obey it, namely, to easy and to wait all she can in the position in which she finds herself. If the *Clan Sinclair* did this, then she will, although the rule is not strictly applicable, have acted upon its intentions so far as was possible. [The learned judge then found as a fact that the *Clan Sinclair* had but little way on her from the first, and had brought herself almost to a standstill at the time when the collision happened, and therefore that so far as possible she had complied with the rule. He then examined the evidence generally in regard to the navigation of the *Clan Sinclair* and of the *Margaret*, and pronounced the latter alone to blame.]

Solicitors for plaintiffs: *Hollams, Son, & Coward.*
Solicitors for defendants: *Freshfields & Williams.*

E. S. R.

[IN THE COURT OF APPEAL.]

May 4.

THE ELIN.

Damage—Wages—Priority of Liens.

The maritime lien for damages, arising out of damage done by a foreign vessel in a collision for which she is to blame, takes precedence of the maritime lien of the seamen for wages earned by them since the collision on board such vessel.

APPEAL from a decision of Sir R. J. Phillimore. (1)

The facts and arguments sufficiently appear from the report of the case in the Admiralty Court.

Phillimore argued for the appellants.

C. Hall, Q.C., and *Stokes*, were not called on.

BRETT, M.R. The sole question in this case is whether we are

(1) 8 P. D. 39.

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prepared to overrule *The Linda Flor* (1), *The Chimæra* (2), and *The Duna* (3), and to say that the rule acted on in *The Benares* (4) is wrong. It has been argued that these cases have been wrongly decided because they break through the rule of the Admiralty Court in regard to the priorities of maritime liens. But *The Linda Flor* (1) was decided on principles quite independent of the rule as to priorities, which was one well understood by Dr. Lushington, and which, in deciding the cases I have mentioned, he never intended to break through. The rule which he acted on was this, that when a foreign ship is seized in the Admiralty Court for a collision caused by her wrongful navigation, then, subject to any statutory limitation of liability, her owner is liable for the whole value of the ship and freight in an action in rem. But then the question arose whether the owner of the wrong-doing ship could relieve himself of that liability to the injured ship by allowing seamen to recover out of the proceeds of his ship and freight wages which he would be liable to pay otherwise than out of this fund. If the Admiralty Court allowed seamen to recover wages out of this fund it would in so doing give a relief to the owner of the wrong-doing ship in the hands of the Court. Dr. Lushington, in exercising the wide equitable maritime jurisdiction of the Admiralty Court, came to the conclusion that it would be unjust to the owner of the injured ship if he allowed the fund against which the lien for damage has priority to be diminished by a payment of wages. This he did quite independently of any mere questions of priority. He did it on the principle of acting justly to the owner of the injured ship. And what we have to decide is whether there is any principle on which we can say that Dr. Lushington's decision is wrong after it has remained unquestioned for so many years. It may perhaps be somewhat hard on the seamen not to allow them to obtain their wages from the res in Court; but it must be borne in mind that they may recover them from the owners of the vessel on which they have served. I agree with Dr.

(1) Swa. 309; 6 W. R. 197.
(2) Not reported.
(3) 5 L. T. (N.S.) 217; 1 Mar. L. C. (O.S.) 159.
(4) 7 No. of Cas. L.

Lushington that as between the two shipowners a contrary decision would inflict a hardship on the owner of the injured ship. Therefore I am not prepared to overrule this long established rule.

COTTON, L.J. The case of *The Linda Flor* (1) is in point here, though there is a yet earlier decision to the same effect, *The Chimæra* (2), and the principle seems to have been laid down also in the previous case of *The Benares*. (3) The question therefore is whether we are to overrule this series of cases. The principle that the owner who has caused the damage shall not be at liberty to withdraw any part of the fund arising from the value of his ship and freight out of the reach of the claimant for damages is I think a just one. I can see no reason therefore why we should reverse the existing rule which has been formulated by these several decisions.

BOWEN, L.J., concurred.

Appeal dismissed.

Solicitor for appellants: *R. Greening.*
Solicitors for respondents: *Stokes, Saunders, & Stokes.*

(1) Swa. 309; 6 W. R. 197. (2) Not reported.
(3) 7 No. of Cas. L.

E. S. R.

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April 30.

[IN THE COURT OF APPEAL.]

THE RIGBORGS MINDE.

Damage—Compulsory Pilotage—Hull Pilot Act (2 & 3 Wm. 4, c. cv.)—Default of Pilot.

A collision occurred in the Humber Dock, Hull, between a fly-boat and a foreign schooner bound to the Prince's Dock. The schooner was in charge of a duly licensed Humber pilot who had taken over the charge of the schooner while she was moored at a pier in the Humber from the pilot who had brought her in from sea. One sum was paid for the services of the two pilots :—

Held, that the schooner was in charge of a pilot whose employment was compulsory by law.

The damage was done by the fluke of the schooner's anchor piercing the side of the fly-boat. The Court found that there was no want of care in the crew in lowering the anchor. The other allegations against the schooner were that the anchor was improperly slung; that she came too fast up the dock and without a check rope :—

Held, that the damage was caused by the fault of the pilot in the course of his duty.

Action for damage by collision by a fly-boat against the Danish schooner *Rigborgs Minde*. The collision occurred on the 4th of March, 1882, in the Humber Dock, Hull, as the *Rigborgs Minde* was proceeding up to her berth; the fluke of her anchor pierced the side of the fly-boat and caused her to sink. The *Rigborgs Minde* was then in charge of a duly licensed Humber pilot, and was bound for the Prince's Dock there to unload her cargo. She had been taken up from sea as far as the Island Pier by a duly licensed pilot, and after waiting there had been taken charge of by another pilot who was to take her to her destination. One sum only was paid for the whole pilotage service.

Sir R. J. Phillimore, found the *Rigborgs Minde* alone to blame.

The owners of the *Rigborgs Minde* appealed.

Phillimore and *Raikes*, appeared for the appellants.

Hall, Q.C., and *Bucknill*, appeared for the respondents.

During the hearing of the case the appellants' counsel contended that, even if there was any negligent navigation on the part of the *Rigborgs Minde*, she was at the time of the collision

in charge of a duly licensed pilot, whose employment at the place of collision was compulsory by law, and that the owners were therefore exempt from liability as any negligence was the negligence of the pilot and not of the crew.

Counsel for the respondents argued contrà.

The question as to whether pilotage was compulsory or not, depended on the construction of the Hull Pilot Act (2 & 3 Wm. 4, c. cv., ss. 22, 36 and 41. (1) The cases referred to were *The*

(1) Sect. 22: "And whereas the guild or brotherhood of Masters and Pilots, seamen of the Trinity House in Kingston-upon-Hull, commonly called 'The Corporation of the Trinity House in Kingston-upon-Hull,' have, as well by usage for a long period of years as by virtue of letters patent or charters granted to them by the Crown, been empowered to appoint pilots, to conduct ships and vessels, sailing or navigating into and out of the port of Kingston-upon-Hull, and the limits and liberties thereof, and into and out of and upon the River Humber, and from the said river out to sea and between Flamborough Head northward and Winterton Ness southward, and into and out of the several ports, creeks, harbours and places situate between those two last-mentioned headlands or places, in pursuance of which powers the said corporation have from time to time appointed a sufficient number of pilots for the purpose before mentioned. Be it further enacted, that it shall be lawful for the said guild or brotherhood of Masters and Pilots, seamen of the Trinity House in Kingston-upon-Hull, commonly called 'The Corporation of the Trinity House in Kingston-upon-Hull,' and they are hereby required to grant licenses under their common seal to such persons as they shall after due examination approve of and think properly qualified to be pilots for conducting ships and vessels into and out of the port of Kingston-upon-Hull, and of the port of Great Grimsby in the county of Lincoln, and upon any part of the river Humber below the said port of Kingston-upon-Hull, and so far out at sea as to bring the North Ness of Dimlington on the coast of Holderness to bear or be seen a sufficient distance clear or open of the land to the southward thereof, so as to pass clear of a certain sand or shoal called the New Sand, and also so far along the coast northward thereof, as the said North Ness of Dimlington, and to the southward thereof, as a certain point or headland on the coast of Lincolnshire commonly called or known by the name of Donna-Nook; and the persons so licensed shall for the purposes of this Act be called 'Humber Pilots' and all ships and vessels sailing, navigated and passing as aforesaid, except as hereinafter provided, shall be conducted and piloted within the limits aforesaid by pilots so licensed, and by no other pilots or persons."

Sect. 36: "And be it further enacted, that the master or other person having the command of any ship or vessel which, under the provisions of this Act shall be liable to pilotage, shall, on arriving at or within the limits for which pilots are directed to be licensed under this Act, display and keep flying or hoisted the usual signal for a pilot to come on board; by hoisting a flag in the daytime and a light in the night time at the mast-head in a

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Maria (1) and *The Gipsey King*. (2) The circumstances under which the collision occurred and the damage was done, appear from the judgment of the Master of the Rolls.

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conspicuous situation clear of the sails and rigging of the vessel and so as to be distinctly visible; and if any Humber pilot shall be within hail or approaching, and within a reasonable distance of any such ship or vessel with the proper distinguishing flag flying in his vessel or boat, the master or other person having the command of such ship or vessel shall, by heaving to in proper time, or shortening sail, or by all practicable means consistently with the safety of the ship or vessel, facilitate such pilots getting on board, and every master or other person having the command of any such ship or vessel who shall not display and keep flying or hoisted such signal for a pilot to come on board from the time such ship or vessel shall have arrived off any or either of the limits before specified as the case shall be, or who shall not heave to, shorten sail, or otherwise consistently with the safety of the ship or vessel facilitate such pilot getting on board as aforesaid, shall forfeit and pay double the amount of the sum which would have been demanded for pilotage of such ship or vessel from the place or distance where such ship or vessel under the provisions of this Act, ought to have displayed and kept flying or hoisted such signal for a pilot to come on board as aforesaid. And be it further enacted, that every such pilot as aforesaid who shall be employed to pilot or conduct any ship or vessel into the said port of Kingston-upon-Hull, shall, and is hereby required to take the same to such place of delivery, whether in the haven or the old harbour or in any of the wet docks of the said port as the master or commander of such ship or vessel shall require, or so near thereunto as he can safely get, and then moor such ship or vessel in some proper situation without being paid any other rate than is hereby directed to be paid for piloting such ship or vessel into the said port, and in cas the attendance of any such pilots shall be required to take care of such ship or vessel from such first mooring and to conduct her higher up the said haven or old harbour or into any of the said wet docks or other place of delivery, the pilot who shall have brought the said ship or vessel to such mooring, or some other of the said Humber pilots to be by the said commodore of pilots appointed for that purpose, on the application of the master or commander of such ship or vessel shall attend and shall be paid for unmooring, transporting and removing such ship or vessel to her place of delivery, as aforesaid. If such ship or vessel shall draw thirteen feet of water and upwards, not less than nine shillings nor more than eleven shillings, and if such ship or vessel shall draw ten feet of water and upwards and not exceeding thirteen feet, not less than six shillings and six pence nor more than eight shillings and sixpence, and if such ship or vessel shall draw under ten feet of water, not less than four shillings nor more than six shillings according to the discretion of the said commissioners."

(1) 1 A. & E. 358.

(2) 2 Wm. Rob. 537.

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BRETT, M.R. In this case the collision occurred in the Humber Dock, Hull, and the judge of the Admiralty Court held that the *Rigborgs Minde* was alone to blame. Although he did not mention the subject of compulsory pilotage in his judgment, I cannot but think that he was of opinion that a compulsory pilot was on board. If that were so, then the *Rigborgs Minde* must have been found solely to blame for something which is not covered by the fact of a compulsory pilot being on board, and if he was dealing with this case as one of compulsory pilotage, he must, I think, have considered that the fault was in the manner and mode in which the anchor was let go when the pilot finally gave the order to do so. The first point then is, was a compulsory pilot on board, and on the construction of the Hull Pilot Act it is clear to me that the pilot taken on board a vessel inward bound to the port of Hull is a compulsory pilot. I am confirmed in this opinion by the decision of Dr. Lushington in the case of *The Maria*. (1) There has, however, been an attempt made to shew that by the change of pilots, the compulsory pilotage ceased. But it is a common custom for pilots to divide their duties, one brings a ship up the port, another takes her into dock, and the two performances of their duty by these pilots must be considered as a single pilotage service, so that here there was one act of pilotage, for which one set of pilotage dues was paid. It has also been argued that the compulsory pilotage had ceased, because the *Rigborgs Minde* had anchored before she was taken into dock, and that therefore on the authority of *The Maria* (3), pilotage was not compulsory. But a temporary anchorage has not this effect. It is not so, unless a vessel is finally anchored at her destination, and until that time the *Rigsborg Minde* was always an inward bound ship, for it must be noticed that this vessel was bound for the Prince's Dock, to which she had to pass through the Humber Dock Basin. Therefore during her progress to her destination it is clear that pilotage was compulsory.

It is next said that the *Rigborgs Minde* did not manage her stern rope properly, that she came up the dock too fast and should have had a check rope to the dolphins, and that her anchor was wrongly and improperly slung, and that when the

(1) 1 A. & E. 358.

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final order to let go was given, that it was done in an unseaman-like manner. But all these matters, with the exception of the last, are connected with the navigation of the ship by way of steering her on her course, and attention to them is within the pilot's duty. As regards also the wrong position of the anchor it is clear from the evidence that it was placed as the pilot wished, and that its position satisfied him, and there is the authority of Dr. Lushington in *The Gipsey King* (1), to shew that this is a matter under the control of the pilot. Assuming then that anything done wrongly up to the moment of letting go the anchor was the fault of the pilot alone, anything done wrong after that moment would be, no doubt, the fault of the crew, for the letting the anchor go was the action of the crew, and the question if they did or did not execute the order properly is one of seamanship. We have asked the nautical assessors their opinion, and they state that they consider there was no want of reasonable care by the crew in lowering the anchor. The negligence on board the *Rigborgs Minde* which caused the collision was therefore that of the pilot alone, and as we consider the fly-boat to blame on the facts, both vessels must be held to blame for this collision, but the owners of the *Rigborgs Minde* are exempt from liability through the fault being that of the compulsory pilot.

COTTON, L.J. Having looked carefully at the sections of the Hull Pilot Act, I am of opinion that on the construction of ss. 22, 36, and 41, pilotage was certainly compulsory on the *Rigborgs Minde*. I agree also that the change of pilots does not make the pilotage less compulsory.

May 1. The question of costs was discussed. Counsel for the appellants argued that the owners of the *Rigsborgs Minde* were entitled to the costs of the appeal, as the decision of the learned judge of the Admiralty Court had been varied.

BRETT, M.R. No costs will be given on either side either here or in the Court below. Both vessels were to blame. It is a fixed rule of the Admiralty Court, both in the Court of first instance

(1) 2 Wm. Rob. 537.

and in the Court of Appeal, that in such case there should be no costs on either side. That rule is not altered by the fact of the fault on one of the vessels being solely the fault of a compulsory pilot in charge.

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Solicitors for appellants: *Pritchard & Sons.*
Solicitor for respondent: *C. A. Clulow.*

E. S. R.

THE SUNNISIDE.

May 21.

Salvage—Evidence—Loss of Earnings by and Damage to Salving Ship.

In an action for salvage, evidence of the loss of earnings by and of the costs of repairing damage done to the salving vessel in consequence of rendering salvage services is admissible. But these sums are to be regarded as elements for consideration in estimating the amount of the salvage reward, but are not to be considered as fixed amounts to be awarded to the salvors in respect of these matters.

SALVAGE ACTIONS against the steamship *Sunniside*, her cargo and freight, by the owners, master, and crew of the steam trawler *Monarch*, and the owners, master, and crew of the smack *Sirius*. These two actions had been consolidated by order of the Registrar before any pleadings were delivered, and the conduct of the consolidated cause had been given to the *Monarch*. Action also by the owner, master, and crew of the steam trawler *Flying Arrow* against the *Sunniside*. The plaintiffs in this action had refused before the delivery of the statement of claim to allow it to be consolidated with the two other actions.

Gully, Q.C., and *Bucknill*, appeared for the *Monarch*.
Aspinall, for the *Sirius*.
Phillimore, for the *Flying Arrow*.
Myburgh, Q.C., and *J. Edge*, for the defendants.

In addition to the facts stated in the judgment of the learned judge, it must be mentioned that in consideration of the *Sirius* assisting the *Monarch* to find the *Sunniside*, it was agreed between the masters of these two vessels that the *Sirius* should receive

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one-third of any salvage award received by the *Monarch*. During the time that the services were rendered it was alleged by the plaintiffs that it was blowing hard, and by the defendants that it was a moderate breeze. When the *Sirius* came up with the *Sunniside* the latter had hoisted the three black balls required by rule 5 of the Regulations for Preventing Collisions at Sea. The *Sunniside* was a steamer of 637 tons net, and of the value of 10,000*l*., the net value of the freight was 259*l*. 9*s*. 2*d*., the cargo was iron ore valued at 293*l*.

During the hearing of the action counsel for the *Monarch* asked certain questions as to the loss of profits occasioned to the trawler by engaging in these services, and also as to the cost of repairing damages occasioned to the vessel by rendering the services in question.

Myburgh, Q.C., objected to the questions on the ground that such evidence was inadmissible, since no fixed sum could be awarded for these matters in addition to the sum given as a salvage reward which covered these items.

Gully, Q.C., and *Bucknill*, argued that this evidence was material, and relied on *The Norden* (1), and on *The Salacia*. (2)

The learned judge admitted the evidence, but referred at length to this point in his judgment, wherein the material facts of the case other than those mentioned above are stated.

May 24. SIR JAMES HANNEN. On the 7th of November, at ten in the morning, the *Sunniside* steamer, which was bound for Shields, met with the misfortune of her engines breaking down, and though she put up what sail she could yet she was not able to be steered. The steering gear was not out of order, but she could not get steerage way in the course she was pursuing with the sails she had. Her position was about twelve miles east of Scarborough, and the wind was S.W., and though it varied during the period that we have to consider, it was always off the shore. On the 8th of November, at nine in the morning, the *Sirius* smack, which had come to the *Sunniside*, was engaged for some particular purpose to render a service to the *Sunniside*, what

(1) 1 Spk. 185. (2) 2 Hagg. 262.

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that service was is to some extent, though very little, in dispute. I find in the log of the *Sunniside*, which was put in evidence, it is entered "9 A.M., 8th November, engaged the smack *Sirius* to go to Scarborough to engage a tug." The captain's statement of what he did with the master of the *Sirius* was as follows:—He says, "I engaged him to take a telegram and send a tug," and in cross-examination, when he was asked what passed, he said, "I said to him, 'Will you take a telegram and send me a tug?' He said he would for 20*l.* I told him to send me tug off. I had the telegram ready made out." The only answer which in any degree tends to modify that statement is this—"It might be after giving him the telegram that I mentioned sending the tug; when he came with the tug I told him I did not want his services any more."

The master of the *Sirius*' account of it is really not substantially different. First of all he says that he went on board, and this agreement was made, and he says "I was to engage a tug." Then he says, in cross-examination, that he saw the telegram, which was, "I have sent for tug." "I was to bring the tug," he says, "the captain of the *Sunniside* asked me to bring it. I never refused to give information. I said I would place him where the ship was; I was not asked for any information. I thought I had the right to make the bargain I did." The agreement mentions that he was for 20*l.* to take the telegram, but I come to the conclusion that he saw what that telegram was and he knew what were the words—"I have sent to Scarborough for a tug." I drew the inference from his own statement that he perfectly understood that the service which he was expected to render for that 20*l.* was not merely to take the telegram ashore and dispatch it, but to give information that the ship was in distress and to direct a tug, if he could find one, to come out to her assistance. In my opinion what he ought to have done would have been entirely within the limits of his rights and duties if he had done it—to have told the master of the tug all that he knew:—"I have seen a vessel in such and such a position which is in want of assistance, and you can go if you like," and if he had done that he would not have been called on to do anything more. If he had given this information

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to the master of the tug, then of course he would have been entitled to make any bargain he pleased; but in doing as he did, in my judgment, he acted quite improperly: it appears from the evidence of the master of the tug that he came to him and said, "There is a vessel in distress; I shan't tell you anything about it unless you agree to give me one-third." That, in my judgment, was improper, but as a matter of fact he went himself, and he took his tug with him, and then what followed was this: at 2.30 in the afternoon the *Monarch* arrived with the *Sirius* in tow.

It is to be observed with regard to the point I have already dealt with as to giving information as to where the vessel was, that it was broad daylight—and that the *Sunniside* was sighted within an hour after starting. Then the *Monarch* took the *Sunniside* in tow, and then the *Sirius* had a rope passed from the *Monarch* to her, and the *Sirius* towed or attempted to tow the *Sunniside* together with the *Monarch*. Now it is admitted that the master of the *Sirius* was not asked to do that, and when questions were being put to him with regard to whether or not his services were ever disclaimed, whether he was ever told that he need not go on towing, he said "No, he could not have done that, he could not make me hear." The *Sirius* was ahead of the tug, and her master had the matter in his own hands; there was no possibility of the master of the *Sunniside* preventing his going on rendering such services as he was rendering.

However, the towing in this fashion went on until half-past one on the morning of the 9th of November, and then, as one of the engines had been got to work to some extent, the *Sunniside* was making such way that the towing of the *Sirius* could not be kept up, even in appearance, and the *Sirius* was cast off by those on board the *Monarch*.

I should observe that in the meantime, a little earlier, the *Flying Arrow* had arrived on the scene, but though she tendered her services they had been refused, but hoping for the job, she kept accompanying the *Sunniside* until four in the morning, when her services were undoubtedly engaged.

It is clear, therefore, that the services of the *Flying Arrow* were accepted, and there seems to have been a reason for it, for the master of the *Sunniside* says that at that time the wind had

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shifted, and it had become more difficult to make the Tyne, and I do not doubt that under the influence of those considerations he engaged the *Flying Arrow* to assist him. But then the next question is, how long did she continue to render any service, and I am sorry to say upon this point, as upon some other points, one in particular, there is a difference in the evidence which has been given which can scarcely be accounted for by the different views which the witnesses take of transactions of this kind. The captain of the *Monarch* says that the *Flying Arrow* only towed for ten minutes before her rope broke. The captain of the *Sunniside* says that she towed for twenty minutes, and those on the *Flying Arrow* said she towed for a full hour. However, at the end of whatever time it was the rope broke, and notwithstanding some efforts to get it again—for that is admitted by those on board of the *Sunniside*—they could not get attached again. At 6.30 the engine had got started again, and she was able in fact to do what remained to be done for the purpose of rescuing the vessel from the difficulties and dangers she was in, and then the *Monarch* was cast off. From that time the *Sunniside* was able to dispense with any services, and her own engines brought her close to the Tyne. After 6.30 the *Monarch* never towed again, but was only in attendance, and came up when the *Sunniside* had got to the harbour, and then, as has been explained, attended on her, being ready to render her service in the navigation up the river, and at about half-past eight the harbour was entered.

When entering the harbour the *Flying Arrow* was again towing, but the question is how long before had she begun to tow.

I am sorry to say that this is a point upon which there is a discrepancy among the witnesses, but I come to the conclusion that all that the *Flying Arrow* did was when the *Sunniside* had practically completed the process of extricating herself from the difficulty and danger she had been in until she got one engine in working order again, that then the *Flying Arrow* was attached for the purpose solely of assisting the *Sunniside* in the navigation up the river. I have described the extent to which I consider these several vessels have rendered services, and I now proceed to say the amount which it appears to me they ought to receive. With regard to the *Monarch*, I consider that she was the vessel

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which performed the real salvage service. A question arose at the hearing yesterday as to the admissibility and effect of evidence of what a salving vessel might have earned if she had not been occupied in rendering the salvage service. I was asked to reject that evidence, but this I did not consider myself at liberty to do, because it appears to me it is admissible as an element to be considered in awarding the remuneration to be paid to a vessel which has rendered salvage services. I remain of the opinion which I expressed yesterday, after considering it further, that it is not to be taken in ordinary cases as a fixed figure always to be allowed as in the nature of damage, and then to be added to the amount awarded for the actual salvage service. I think the loss of earnings and the actual services must be considered under ordinary circumstances together. It is to be remembered that the reason why so high a rate of remuneration is given for salvage service is because of the sacrifices which the salving vessel makes, but to give, as it were, damages for the sacrifices made, and also a high rate of salvage remuneration, would be to give that remuneration twice over. As a rule, therefore, it appears to me that the amount for loss of trade and so on cannot be taken as an actual figure in calculating what the salvage reward is to be.

The same remarks apply, though not with the same force, to the question of damage done. But there is a reason in this case why a distinction should be drawn, and I propose to do it for the purposes of this case only.

The master of the *Sirius* made the bargain I have already mentioned, and with it I have nothing to do in this case. I am of opinion that his own evidence shews that in going out with the *Monarch* he was going out for the purpose of enabling the *Monarch* to earn that money of which he was to get a share.

I consider that the *Sirius*' services in the matter are reduced simply to the assistance, such as it was, which she was able to render by towing during those hours in which she was actually so occupied, and for any further remuneration she has cast in her lot with the *Monarch*, and I have nothing to say to that. But as it would plainly be wrong that in getting her one-third she should have one-third of the money which it would cost to put the *Monarch* in repair again, and as it would plainly be wrong that she

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should have one-third of any compensation which can properly be attributed to the loss of profits which the *Monarch* might have made in this case, I propose to discriminate and to mention the sum which I think should be given in respect of the salvage service pure and proper, and I fix it for the *Monarch* at 200*l.*, and I allow 100*l.* beyond this sum for loss of profits and for repairs.

To the *Sirius*, in addition to the 20*l.* which she got for what is in itself no doubt a salvage service, I give 10*l.*, making 30*l.* in all.

The *Flying Arrow*, although her services were not as a matter of fact of any very great value, yet went out, the crew making a difficulty in going out at night. I have already pointed out that I consider there was a change in the circumstances which made those on board the *Sunniside* anxious to have her further assistance. I consider, therefore, that though she was not in fact able to render a very great service, yet that she did render some salvage services, and for them I allot her 70*l.*

June 27. SIR JAMES HANNEN. I have taken time to consider the question of costs in this case, and I have consulted with Butt, J., and I allow one set of costs to the *Monarch* and *Sirius*.

July 9. *Myburgh, Q.C.*, made a further application that the costs of the *Flying Arrow* should not be allowed.

Phillimore opposed the application.

SIR JAMES HANNEN ordered that the *Flying Arrow* should not be allowed any costs incurred after the delivery of the statement of claim until the preparation of the brief for one counsel at the hearing.

Solicitors for the *Monarch*: *Andrew, Wood, & Glasier.*
Solicitors for the *Sirius*: *Pritchard & Sons.*
Solicitor for the *Flying Arrow*: *W. Batham.*
Solicitors for defendants: *Botterell & Roche.*

E. S. R.

1883
June 7.

[IN THE COURT OF APPEAL.]

THE HOPE.

Practice—Compromise—Solicitors' Costs.

In an Admiralty action for wages the plaintiffs and defendants compromised the action by payment to each of the plaintiffs of a certain sum in discharge of the claim and costs. The plaintiffs left the country without paying their solicitors' costs :—

Held, by the Court of Appeal, reversing the judgment of Sir R. J. Phillimore, that as there was no evidence that the parties had made the settlement with the intention of depriving the plaintiffs' solicitors of their lien for their costs, the defendants ought not to be ordered to pay the plaintiffs' taxed costs.

Brunsdon v. *Allard* (2 E. & E. 19), *In re Sullivan* v. *Pearson*, *Ex parte Morrison* (L. R. 4 Q. B. 153) approved.

Appeal from a judgment of Sir R. J. Phillimore delivered in chambers. The action was commenced by writ of summons on the 17th of January, 1882, in the Liverpool District Registry, to recover a sum alleged to be due to two seamen for wages earned on board the ship *Hope*. Both the seamen, the plaintiffs, and the defendants, the owners of the *Hope*, employed solicitors. On the 22nd of January the plaintiffs came to the defendants' office, and the parties settled the action by the plaintiffs each taking 5*l*. in settlement of their claim and costs. The plaintiffs left the country without paying the charges of their solicitors, Messrs. Carr & Tomkies. The latter then applied to the Liverpool district registrar for an order on the defendants that they should pay their (the solicitors) taxed costs. This summons was referred by him to Sir R. J. Phillimore, who in chambers made the required order, stating therein as a ground for so doing that the settlement was made "behind the backs" of the solicitors.

The defendants appealed.

Bigham, for the appellants. It was competent for the parties to make this settlement, and this order should not have been made unless the judge had evidence before him that the parties intended to deprive the solicitors of their lien. [He referred to *Brunsdon* v. *Allard* (1); *In re Sullivan* v. *Pearson*, *Ex parte Morrison* (2).] There is here no evidence of any such intention.

(1) 2 E. & E. 19. 5 Jur. N S 596 (2) L. R. 4 Q. B. 153.

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Nasmith, for the respondents. The Court of Appeal will not interfere as a rule with the discretion of the judge below.

[BRETT, M.R. This is not a question of discretion. You must shew that both the parties intended by the compromise to deprive the solicitors of their costs. The cases are clear on this point, and I see no evidence of this kind in your affidavit.]

The fact that the plaintiffs were sailors, who might be likely to leave the country without paying their solicitors, and that the defendants were shipowners, who are aware of the character of the plaintiffs, is sufficient evidence. There is, no doubt, no direct evidence of such an intention.

[FRY, L.J. You must give clear evidence of collusion and conspiracy to deprive the solicitors of their costs.

BRETT, M.R., referred to *Nelson* v. *Wilson*. (1)]

BRETT, M.R. There is some little difficulty in this case because it was not argued before Sir Robert Phillimore in Court, nor were the decisions bearing on the point cited before him. No point has however arisen as to whether or not we can entertain the appeal. I do not think that we can differ from the judge merely on the ground that we do not agree with his view of the evidence. But he decided this case on wrong legal principles, for he held that if a compromise is made by the clients without the knowledge and acquiescence of the solicitors of the plaintiffs it was not valid as against the plaintiffs' solicitors. I say this because there is no evidence that there was any intention on the part of the plaintiffs or the defendants to deprive the plaintiffs' solicitors of any lien which they might have for their costs. Therefore the phrase in the order "behind the backs" of the solicitors must mean that the compromise was made without the knowledge and acquiescence of the plaintiffs' solicitors. Accordingly we have before us a decision based on a wrong principle, as the cases cited to us clearly shew. Such a compromise as that which the learned judge considered that there was in this case is not sufficient ground for the order which he made, for the plaintiffs' solicitors must shew that both the plaintiffs and the defendants entered into the compromise with the intention of depriving them of their

(1) 6 Bing. 568.

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lien. Now there is here absolutely no evidence of any such intention. We are asked to infer it from the fact that the compromise was made by sailors with shipowners; but there is no rule of law that sailors are to be presumed to be cheats, nor can we presume that the shipowners would suppose that the sailors would not pay their solicitors. The facts of this case are not brought within the rule of law applicable to this subject, and this appeal must therefore be allowed.

LINDLEY, L.J. There is no difference on the point which has been discussed before us between the principles applicable to cases in the Admiralty Division and those in any other Division of the High Court. There is no rule that the parties may not compromise an action without the intervention of their solicitors. They must, however, do so honestly, and not intend to cheat the solicitors of their proper charges. The general rule is correctly laid down in Chitty's Archbold's Practice (13th ed.), p. 143, where, after some observations on the subject of solicitors' liens, it is said: "So the Court will exercise it," that is, its equitable interference to enable the solicitor to proceed in the action for his costs, "though no such notice," that is, of his lien, "has been given in cases where it is clearly made out that there has been some collusion or fraudulent conspiracy between the parties to cheat the solicitor of his costs. But unless such notice has been given, or there has been such collusion or fraudulent conspiracy, the client, although he sues in formâ pauperis, may compromise with the other party and give him a release without the intervention of his solicitor, and the solicitor in such a case can afterwards look to his client only for payment, and cannot proceed in the action." Here we have no evidence of any intention to defraud the solicitors, and we cannot presume that the sailors are cheats.

FRY, L.J., concurred.

Appeal allowed, with costs.

Solicitors for appellants: *W. W. Wynne & Son.*
Solicitors for respondents: *Speechly, Mumford, & Co.*

E. S. R.

THE YAN-YEAN.

1883
May 25.

Salvage—Misconduct of Salvors—Counter-claim.

The master and crew of the Y., a vessel in distress, got on board the K., a steamer standing by her. The mate and two of the crew of the K. afterwards went on board the Y. but refused to take her master back with them. The mate subsequently also refused the services of a steam-tug, and finally having from want of local knowledge anchored the Y. in an insecure place, she began to drift, was forsaken by the salvors, and sank. She was subsequently raised by her owners at considerable expense. In an action for salvage the owners of the Y. denied that a reward was due, and counter-claimed for damages:—

Held, that the mate was guilty of misconduct in refusing to take the master of the Y. on board of her, and to engage the services of the tug; but that if the Y. had been ultimately saved such misconduct would have worked a partial forfeiture of the reward only:

Held, further, that as the loss arising from the misconduct of the salvors was probably equal to that from which the Y. was first rescued, no salvage reward was due.

Counter-claim for damages dismissed.

Action of salvage. The following authorities were referred to: *The Atlas* (1); *The Perla* (2); *The Marie* (3); *The Charles Adolphe* (4); and *The Magdalen.* (5)

Phillimore, for the plaintiffs.

Russell, Q.C., and *Kennedy*, for the defendants.

The facts and points in dispute are fully set out in the judgment of Sir James Hannen.

Cur. adv. vult.

June 26. Sir James Hannen. This is a claim for salvage. It appears that the *Kirkstall*, a screw steamer of 238 tons register, was on the 3rd of April, 1881, proceeding up the Bristol Channel to Newport with a cargo of pig iron. She had a pilot boat in tow which had been picked up in a disabled condition.

At 5 p.m. she was abreast of Lavernock Point, the wind blow-

(1) Lush. 518.
(2) Sw. 230.
(3) 7 P. D. 203.
(4) Sw. 153.
(5) 31 L. J. (Ad.) 22.

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ing a fresh gale from the east, when she observed farther out in the channel a vessel which turned out to be the *Yan Yean*, a steam barge of ninety tons bound from Port Talbot, near Swansea, to Bristol, laden with tin plates.

The *Yan Yean* had her head to the west, the sea was breaking over her, and she had become unmanageable. Those on board of her were making signals for assistance by holding up a rope indicating a wish to be towed. The *Kirkstall* endeavoured to approach her, and in so doing, by an accident for which I am advised, and think no blame is imputable to the *Kirkstall*, the pilot cutter which she had in tow came in contact with the *Yan Yean*. The captain and all his crew in alarm immediately jumped on board the pilot cutter, and the *Yan Yean* was left with no one on board. In this condition she drifted inside of Lavernock Point to the north into comparatively smooth water, where she would have gone ashore on a hard beach, if the master of the *Kirkstall* had not ordered a boat to be lowered in which the mate and two of his crew went to the *Yan Yean* and got on board of her. The evidence is conflicting whether an offer was made to the captain of the *Yan Yean* to take him on board his vessel and whether he refused. I am of opinion that no such offer was made, but that on the contrary the master of the *Yan Yean* requested to be taken on board, and that the mate of the *Kirkstall* refused to take him. Those in the *Kirkstall's* boat having boarded the *Yan Yean*, let go her anchor, and found that there was very little water in the boiler. The boat was therefore sent back to the *Kirkstall* to fetch an engineer. The second engineer was accordingly sent, and when the boat was passing the pilot cutter, in which the master and crew of the *Yan Yean* still were, the master again requested to be taken on board his vessel, but he was again refused. Apart from the questions arising upon this refusal, I am of opinion that the *Kirkstall* had, up to this point, rendered valuable salvage service to the *Yan Yean*, for which she would have been entitled to substantial salvage remuneration. The second engineer of the *Kirkstall* attended to the boiler and engines of the *Yan Yean*, and she was soon in a condition to steam towards Cardiff. Whilst the *Yan Yean* was at anchor a steam tug came up, and offered to tow the

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Yan Yean to a safe place at Cardiff for 10*l.* The mate of the *Kirkstall* refused to give him more than 5*l.* He then took the *Yan Yean* towards Cardiff, and anchored her on the Cardiff Flats. There was, however, no reason why she should not have been taken within the Pier Head or the Ely Harbour, in either of which places she would have been in safety. The Cardiff Flats, where she was anchored, is a place where small vessels are sometimes allowed to take the mud, but it is very exposed, especially to east winds, and I am advised and think that as there was nothing to prevent the *Yan Yean* being taken into a secure berth, it was negligent and unskilful to place her on the Flats. During the night of the 3rd of April the wind increased to a gale from the east, and the mate and the three men who were in charge of the *Yan Yean* becoming alarmed, left her, and took refuge on board a vessel called the *Varna*. The *Yan Yean* afterwards dragged her anchor to the edge of the "drain" or passage through the Flats, where she sunk. The *Yan Yean* was afterwards raised at an expense of 125*l.*, but her cargo was seriously damaged by being under water.

In these circumstances I was asked to decree salvage remuneration. I have already said that I consider that valuable services were rendered by the mate of the *Kirkstall* and his companions in going on board the *Yan Yean* and getting her anchor out before she ran ashore at Lavernock Point; but I do not consider that there was any difficulty or risk in doing this. The mate, however, was guilty of very reprehensible misconduct in refusing to take the master of the *Yan Yean* on board his ship. He was further not justified in refusing the aid of the tug for so small a sum as 10*l.*, as he had not himself the local knowledge which would have enabled him to take the *Yan Yean* to a place of safety. If the mate had brought the *Yan Yean* into harbour, I have the authority of Dr. Lushington (1) for holding that the refusal to take the master on board would not work a total forfeiture of salvage remuneration. But in this case there can be little doubt that the ultimate loss arose from the mate's refusal to receive the captain of the *Yan Yean*, or to accept the aid of the

(1) *The Perla*, Sw. 230.

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master of the tug, from either of whom he might have obtained the local knowledge which it is to be presumed he did not himself possess.

It was laid down by the Privy Council in the case of *The Duke of Manchester* (1), that if by the negligence of the salvors a ship is led into peril as great as that from which she has been rescued all claim to salvage is forfeited. In this case I am advised that the risk of total loss, if the *Yan Yean* had been allowed to drift on Lavernock Point, was great. But on the other hand it is a matter of the vaguest speculation whether the ship and cargo did not sustain as much damage from the sinking in the "drain" as would have resulted from taking the shore at Lavernock Point.

As therefore the misconduct of the salvors was great and has resulted in a loss which cannot clearly be seen to be less than that from which the vessel was saved, I am of opinion that the plaintiffs are not entitled to salvage.

I do not, however, consider that the circumstances call for the condemnation of the owner of the *Kirkstall* in damages beyond the forfeiture of the salvage, but as I think that the action ought not to have been brought the plaintiffs must pay the costs.

Solicitors for plaintiffs: *Ingledew & Ince.*

Solicitors for defendants: *Waltons, Bubb, & Walton.*

(1) 6 Moo. P. C. 91.

E. S. R.

THE HEINRICH BJORN.

1883
July 23.

Necessaries—3 & 4 *Vict. c.* 65, *s.* 6—*Policy of Insurance*—*Manner of advancing Money for Necessaries.*

The insurance of a ship is not a necessary within the meaning of 3 & 4 Vict. c. 65, s. 6.

The managing owner of a foreign ship was indebted on a general account unconnected with the ship to the plaintiffs, and the freight of the ship was in the hands of certain shipbrokers, and the plaintiffs refused to make a further advance to such managing owner, but agreed to advance money for necessaries for the ship. In accordance with this arrangement the plaintiffs handed a cheque to the managing owner as though for the purchase of necessaries, and he at once returned it to the plaintiffs as payment of his debt to them, and the necessaries were actually purchased out of the freight in the hands of the shipbrokers:—

Held, that, under the circumstances, the money must be considered as having been advanced for the purchase of necessaries, and that the manner of the advance was no bar to the plaintiffs' right to recover such an amount as was actually spent in necessaries.

Action for necessaries. The plaintiffs, Messrs. C. & C. J. Northcote, were shipbrokers in London, and the defendants were the present owners of the *Heinrich Bjorn*, a Norwegian vessel, to whom she had been sold since the proceedings which were the subject of the action took place. The claim was in respect of three items, namely, 68*l.* 6*s.* 8*d.*, the amount paid by the plaintiffs for premiums of insurance on 650*l.*, being partially the value of the *Heinrich Bjorn;* 550*l.* alleged to have been paid to the owners and master in respect of necessaries, of which sum however 200*l.* was simply an ordinary advance to the managing owner, and 64*l.* 19*s.* 6*d.* a further sum which was not disputed by the defendants. The *Heinrich Bjorn* arrived at Liverpool in February, 1882, and at that time one Abrahamsen, a part owner, who was her managing owner, was in England on business. The freight of the *Heinrich Bjorn* was collected by Messrs. Broderson, Vaughan, & Co., shipbrokers of Liverpool, in whose hands the *Heinrich Bjorn* was placed. It did not appear from the evidence at what date the necessaries in respect of which the alleged advance was made were supplied. The circumstances under which the advance was made and the manner in which it took place are set out in the

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judgment of Sir James Hannen. Evidence was called by the plaintiffs only.

June 26. *Hall, Q.C.*, and *Bucknill*, for the plaintiffs, as to the first item, argued that money paid for premiums of insurance was money paid for a necessary within the meaning of 3 & 4 Vict. c. 65, s. 6: *The Riga.* (1) As to the second item, so far as the sum of 350*l.* was concerned, this was also money expended on necessaries, and the fact of there being a peculiar arrangement in regard to the manner in which it was advanced was not a bar to the recovery of the amount by the plaintiffs so long as it was a bonâ fide arrangement.

Myburgh, Q.C., and *Pyke*, for the defendants, argued that the insurance was not a necessary for a voyage, and that the arrangement under which the sum of 350*l.* was advanced, shewed that it was not an advance for necessaries which were in fact paid for out of the freight.

Hall, Q.C., in reply.

Cur. adv. vult.

July 23. SIR JAMES HANNEN. This is a suit for necessaries supplied to the ship *Heinrich Bjorn*, a Norwegian vessel. It is sought to be enforced against the ship, which has been purchased by the defendants since the alleged supplying.

In March, 1882, the *Heinrich Bjorn* was lying at Liverpool and was in need of certain necessaries. Abrahamsen, the owner of five-sixths of this vessel, who was the managing owner, was indebted to the plaintiffs in the sum of 398*l.* on a general account unconnected with the ship, and he required a further advance. This the plaintiffs refused to make, and pressed Abrahamsen, who was then in England, for payment. The *Heinrich Bjorn* was at that time in the hands of Messrs. Broderson, Vaughan, & Co., shipbrokers, of Liverpool, and they had received, or were about to receive, the freight due on the ship's voyage to Liverpool, out of which they were to disburse the ship. Abrahamsen, in order to induce the plaintiffs to make the further advance, proposed if the plaintiffs disbursed the ship to give them a lien on it, and to this the plaintiffs agreed.

(1) 3 Ad. & E. 516.

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The manner in which this arrangement was attempted to be carried out was as follows. The sum which was required for the disbursement of the ship for its outward voyage was estimated at 350*l.* Instead of paying 350*l.* of the debt due to the plaintiffs out of the freight and the plaintiffs advancing that sum to Abrahamsen for the purchase of necessaries, it was agreed that this amount should be settled in account between them as though this had been done, and to symbolise this arrangement the plaintiffs handed Abrahamsen a cheque for 350*l.* as for necessaries, which he immediately returned to the plaintiffs in discharge of so much of the debt due to them. The plaintiffs made a further advance of 200*l.* to Abrahamsen, and an agreement was then drawn up of the 23rd of March, in which it was stated that in consideration of the plaintiffs advancing an amount of about 600*l.* "for necessaries supplied" to the *Heinrich Bjorn*, Abrahamsen undertook to return the amount advanced with interest and all charges on the return of the vessel from her voyage, and he authorized the plaintiffs to cover the amount advanced by insurance on the ship out and home at his cost.

The plaintiffs effected this insurance and paid premiums amounting to 68*l.* 6*s.* 8*d.*, and this is the first item in the claim for necessaries. I am however of opinion that premiums for insurance cannot be regarded as necessaries. The expression "necessaries supplied" in 3 & 4 Vict. c. 65, s. 6, which gave the Admiralty Court jurisdiction over foreign ships, though it is not to be restricted to things absolutely and immediately necessary for a ship in order to put out to sea, see *The Perla* (1), must still be confined to things directly belonging to the ship's equipment necessary at the time, and under the then existing circumstances for the services in which the ship is engaged: see *The Alexander*. (2) But the insurance of a vessel is something quite extraneous to its equipment for sea, and however prudent it may be for an owner to insure it is a prudence exercised for his own protection and not for the requirements of the vessel, in the sense in which the word "necessaries" is used in the statute. With regard to the second head of claim for disbursements, I am of opinion that the plaintiffs are entitled to recover so much of the

(1) Sw. 353. (2) 1 Wm. Rob. 346, at p. 361.

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sum of 350*l.* as was in fact expended in necessaries for the *Heinrich Bjorn*. The plaintiffs and Abrahamsen attempted to create a charge on the ship for the further amount of 200*l.* advanced to Abrahamsen and for the balance of the 398*l.* not discharged by the return of the cheque for 350*l.* and for the premiums of insurance. They thought that they could do this by treating the whole amount as though it were for necessaries, but it was not competent for them to do so. In whatever other way Abrahamsen might have given a charge on the ship, or his shares in it, he could not do so by calling things necessaries which were not so in fact. But, assuming that 350*l.* was bonâ fide required for necessaries, then, though the mode of carrying out the arrangement between the plaintiffs and Abrahamsen was peculiar and calculated to excite suspicion, I think that when explained it establishes the plaintiffs' right to recover that amount in this action. If the plaintiffs had advanced 350*l.* for the purchase of necessaries their right would have been clear, and I do not think that it was necessary that the additional step should be gone through of obtaining the freight from the brokers at Liverpool and paying it over to the plaintiffs, and then of the plaintiffs advancing the sum required to Abrahamsen with regard to the amount if it is disputed by the defendants. It must be referred to the Registrar to ascertain the sum which was actually expended on necessaries, as under the circumstances I am of opinion that the defendants are not precluded from disputing the amount due to the plaintiffs.

Solicitors for plaintiffs: *Hollams, Son, & Coward.*
Solicitors for defendants: *Plews, Irvine, & Hodges.*

E. S. R.

THE THYATIRA.

1883
July 10.

Collision—Sum in the Nature of Freight—Bill of Lading—Right of Action.

A ship *A.* and her cargo belonged to the same owners, and the plaintiffs advanced 1000*l.* as a loan to such owners, and received as security, in conformity with the agreement made between them and the borrowers, the bill of lading, on which the master indorsed a receipt for 1000*l.* as advanced freight, and also a policy of insurance on advanced freight. Ship *A.* was lost through a collision with the defendants' vessel, whose negligence was admitted. It was proved that the difference between the value of the cargo at the port of destination and at the port of loading would have considerably exceeded 1000*l.* In an action by the holders of the bill of lading for 1000*l.* against the defendants' ship :—

Held, that the plaintiffs were entitled to recover the sum, though it was not, strictly speaking, advanced freight, but a prospective increase in the value of the cargo, and that the insurers were subrogated to the rights of the plaintiffs.

A sum in respect of disbursements for ship *A.* on her voyage and wages paid in advance had been awarded to the owners of the *A.* by the registrar and merchants :—

Held, further, that this was no bar to the plaintiffs' right to recover in this action.

This was an action brought by Messrs. Cockbain, Allardice, & Co., the assignees of a bill of lading, and a policy of insurance on 1000*l.* advanced freight, against the owners of the *Thyatira* and her freight to recover compensation for the loss of 1000*l.*, being so-called advanced freight. This loss was occasioned by a collision between the *Thyatira* and the *Atmosphere*, the ship by which the so-called freight was to be earned. The defendants admitted that the collision was caused by the negligent navigation of the *Thyatira*, but they denied, among other things, that any sum was advanced in respect of freight, and during the course of the hearing they set up a further defence that if any sum in the nature of advanced freight was recoverable it had been recovered by Messrs. Vaughan & Co., the owners of the *Atmosphere* and of the cargo on board of her, since the registrar of the Admiralty Division, on the reference, had awarded to them a sum of 576*l.* 7*s.* 6*d.* in respect of the necessary disbursements to send the vessel to sea, and further sums for advances to and outfit of the crew, making a total of 783*l.* 14*s.*, with interest at 4 per cent. from the loss of the ship to payment.

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The cardinal facts of the case are set out in the judgment of Sir James Hannen. Evidence as to the facts was given at the hearing.

June 28. *Cohen, Q.C.*, and *Pollard*, for the plaintiffs, argued that the plaintiffs were entitled to recover the sum sued for, as it was, though not actually freight, yet a sum which had the ship and cargo belonged to different owners would have been actual freight. It is a substantial sum.

[They referred to *Hall* v. *Janson*. (1)]

Gully, Q.C., and *Bucknill*, for the defendants, argued that there was here no advanced freight, it was merely a possibly increased value of the cargo at the port of destination of the ship which the plaintiffs were suing for, and at the most the owners of the *Atmosphere* had recovered any sum which was recoverable by the award of the registrar and merchants of the sum of 783*l.* 14*s.* with interest, and therefore the plaintiffs could not recover anything in this action.

[They referred to *The Parana*. (2)]

Cohen, Q.C., in reply.

Cur. adv. vult.

July 10. SIR JAMES HANNEN. Messrs. Vaughan & Co. were the owners of the ship *Atmosphere*, in which they shipped a cargo of 1650 tons of their own coal from Liverpool to Valparaiso. The price of the coal at Liverpool was 9*s.* per ton, and it would have fetched from 30*s.* to 33*s.* per ton at Valparaiso. Messrs. Vaughan & Co. desiring an advance of 1*l.* per ton on this cargo, the plaintiffs, Messrs. Cockbain & Co., agreed to make it on the terms that Messrs. Vaughan & Co. should hand them "bills of lading together with policies of insurance to cover them in case of loss." This arrangement was carried out in the following manner. The master of the *Atmosphere* signed bills of lading for 1652 tons of coal, deliverable to Messrs. Vaughan & Co. or assigns, they paying freight at the rate of 23*s.* per ton, and he indorsed on the bill of lading a receipt for 1000*l.* on account of freight.

(1) 4 E. & B. 500. (2) 2 P. D. 118.

An insurance was effected with the Thames and Mersey Marine Insurance Company, described as advanced freight valued at 1000*l.* This policy, together with another on cargo, and the bill of lading duly indorsed were handed to the plaintiffs on their making an advance of 1650*l.*

The *Atmosphere* while on her voyage to Valparaiso was run down and sunk by the *Thyatira.*

This action is brought by the plaintiffs against the owners of the *Thyatira* to recover compensation for the loss occasioned to them by the sinking of the *Atmosphere,* "whereby," as alleged in the statement of claim, "the said advanced freight of 1000*l.* became and was wholly lost."

The action is in fact brought for the benefit of the insurance company, who have paid the amount of 1000*l.* insured by them. This, however, can in no way affect the rights or liabilities of the parties to this action.

The defendants deny their liability to the plaintiffs, contending that no freight in advance was in fact paid, and so that none has been lost.

If Messrs. Vaughan & Co. had had on board the *Atmosphere* a cargo belonging to other persons they would have had the cargo together with the freight to be earned by carrying it to offer as security for the proposed advance, but as they were the owners of the cargo they had not any claim to freight properly so called to offer as security. They had, however, the prospective benefit to be derived from the carriage of the coal in their own ship, that is, the enhanced value of the coal when conveyed to the port of delivery, and this, though not strictly freight, is so like it that it has been held that it may be insured under that name: *Flint* v. *Flemyng.* (1) It was perfectly competent for Messrs. Vaughan & Co. to transfer the benefit of this enhanced value, under whatever name, to the plaintiffs. If it be regarded from the point of view of the shipowner it was freight, but if regarded from the point of view of the cargo owner it is freight paid in advance, because the holder of the bill of lading would have been entitled to receive the cargo at Valparaiso without paying any freight.

(1) 1 B. & Ad. 45.

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The plaintiffs, who are the holders of the bill of lading, have been deprived of this benefit by the wrongful act of the *Thyatira*, and for this they are entitled to compensation. What is the proper amount of that compensation? It is not to be computed according to the rate of freight mentioned in the charter, because that might only be an imaginary sum exceeding what could have been obtained as freight or as increased value by reason of not having to pay freight, but there is nothing to contradict the evidence that the enhanced value of this cargo at Valparaiso would have been at least 21*s.* per ton, or 1732*l.*, more in fact than the amount sought to be recovered in this action as the equivalent for the advanced freight. It cannot, therefore, be contended that the benefit which would have been derived from carrying the cargo to Valparaiso is estimated in this action at a fictitious or exaggerated amount.

The case of *The Parana* (1) was relied on by the defendants. It was there held that damages cannot be recovered for delay in the carriage of goods on a long voyage by sea, where there has been an accidental fall in the price between the time when the goods ought to have arrived and the time when they did arrive. But no question of a rising or falling market occurs in this case. The plaintiff's estimate of loss is not based on the highest price that could in any circumstances be obtained at Valparaiso, but on the uncontradicted evidence that the increased value of the cargo free of freight would have been far more than the 1000*l.* claimed in this action.

It was further contended by the defendants that, if the 1000*l.* now claimed is to be regarded as freight, Messrs. Vaughan & Co. have claimed in another action brought by them against the *Thyatira* and her owners for the disbursements made in order to earn the so-called freight, and that the defendants ought not to be called on to pay both disbursements and freight. This, however, is no defence to this action, in which the plaintiffs are suing as holders of the bill of lading, and they cannot be prejudiced by what has passed without their concurrence between Messrs. Vaughan & Co. and the defendants.

(1) 2 P. D. 118.

Messrs. Vaughan & Co. are not before me on this occasion, and I therefore abstain from expressing an opinion whether they are or are not entitled to recover the disbursements they claim. (1)

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Solicitors for plaintiffs: *Freshfields & Williams.*

Solicitors for defendants: *Pritchard & Sons.*

E. S. R.

JUMP *v.* JUMP.

April 24.

Dissolution of Marriage—Variation of Settlement—Covenant to pay Annuity.

The Court has power to vary a post-nuptial settlement contained in a deed of separation by reducing the amount of an annuity which the husband has covenanted to pay.

THIS was an application to alter the amount of an annuity payable to the respondent under a deed of separation and post-nuptial settlement.

The petitioner, Peter Selsby Jump, had obtained a decree nisi for dissolution of his marriage by reason of the respondent's adultery, and that decree was made absolute on the 28th of November, 1882.

By an indenture bearing date the 28th day of August, 1880, the petitioner and respondent had agreed to live separate, and the petitioner had covenanted (amongst other things) to allow the respondent the sum of 15*s.* a week, and that she should have the absolute and complete custody of the two children of the marriage, but the husband had since the decree absolute obtained possession of the children.

A petition was filed to vary this deed by reducing the allowance to 10*s.* a week, and the report of the registrar submitted for the consideration of the Court whether under any order made in

(1) July 30. *Aspinall*, on behalf of Messrs. Vaughan & Co., applied for an order for payment to them of 1000*l.*, which had been deposited in a bank by a private arrangement between Messrs. Vaughan & Co. and the owners of the *Thyatira* until the action by Messrs. Northcote was heard. The application was opposed by Bucknill for the owners of the *Thyatira*. Sir James Hannen refused to make the order, and referred the matter back to the Registrar to reconsider his report, having regard to the above reported judgment.

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pursuance of 22 & 23 Vict. c. 61, the petitioner can be released from the performance of his covenant to pay the annuity.

April 5. *Middleton*, for the respondent. The annuity is not "property settled" within the meaning of the 6th section of 23 & 24 Vict. c. 61 (1): *Bullock* v. *Bullock and Strong* (2); *Benyon* v. *Benyon*. (3) By varying the order the Court would affect the interests of the children, which it has no power to do: *Crisp* v. *Crisp*. (4)

Inderwick, Q.C., contrà.

Cur. adv. vult.

April 24. SIR J. HANNEN (President). The marriage between these parties was dissolved on the 28th of November, 1882, on the ground of the wife's adultery.

A petition has since been presented for the variation of a post-nuptial settlement contained in a deed of separation entered into between the parties and a trustee on behalf of the wife on the 28th of August, 1880, by which the petitioner and his wife agreed to live separate for the remainder of their lives, and the petitioner covenanted to pay the respondent 15*s*. a week, and to permit her to have the custody of their two children, wholly freed from his authority, as if she were a feme sole.

The petitioner has since the decree nisi taken possession of the children of the marriage, and I am not, in the existing circumstances, of opinion that it would be for the benefit of the children that his agreement to suffer the respondent to have the care and control of the children should be enforced. An objection seems to be taken, if I understand it rightly, that the Court cannot make any order with reference to this deed, on the ground that no "property" is thereby settled, but an annuity is a well recognised form of personal property, and can be dealt with in all respects as such. The only doubt I have entertained has

(1) The following are the material parts of the section referred to:—

"The Court after a final decree of . . . . dissolution of marriage may inquire into the existence of . . . . post-nuptial settlements . . . . and may make such orders with reference to the application of the whole or any portion of the property settled . . . . as to the Court shall seem meet."

(2) Law Rep. 2 P. & D. 389.

(3) 1 P. D. 447.

(4) Law Rep. 2 P. & D. 426.

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been whether, having regard to the smallness of the amount, I should interfere; but as it has not been shewn that it was disproportionate to the husband's means, I think that in the changed condition of things some reduction should be made, and I accordingly order that the petitioner be at liberty to retain, out of the 15*s.* covenanted to be paid, the sum of 5*s.*, and that in future he pay weekly 10*s.* only to the respondent.

Solicitors for petitioner: *Crosse & Sons.*
Solicitors for respondent: *Ayrton & Biscoe.*

R. A. P.

HUNT *v.* HUNT.

May 1.

Judicial Separation—Custody of Children—Maintenance—Security.

Upon a decree for judicial separation when the Court has ordered a provision to be made for the children it has no power to order also that the respondent shall secure the payment.

THIS was a petition by a wife in which the Court made a decree for judicial separation by reason of adultery, and gave the petitioner the custody of the two children of the marriage.

The respondent had been ordered to pay the sum of 30*l.* a year for the maintenance of the children, and it appeared that he was possessed of the sum of 1400*l.* invested in a building society and of some smaller sums in other investments.

Searle, for the petitioner, moved the Court to order that some of the moneys so invested be set aside to secure payment of the 30*l.* a year ordered for maintenance of the children.

Strong, contrà. The Court has no jurisdiction to make such an order. The 35th section of the first Divorce Act (1) only gives a general power to make a provision for maintenance. If the legislature had intended to give authority to order a sum of

(1) The following are the material parts of the section referred to: "In any suit . . . . for obtaining a judicial separation . . . . the Court may . . . . make such provision in the final decree as it may deem just and proper with respect to the . . . . maintenance and education of the children the marriage of whose parents is the subject of such suit."

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money to be secured it would have used express language for the purpose as in the 32nd section.

SIR J. HANNEN (President). I am of opinion that I have no power to make the order asked for.

Motion refused.

Solicitors for petitioner: *Hicklin & Washington.*
Solicitor for respondent: *W. Millman.*

R. A. P.

May 1.

IN THE GOODS OF MARY ANN KING, DECEASED.

Administration with Will annexed de bonis non—Grant to Legatee—Citation—Justifying Security.

The estate of a testatrix having been administered, except as to one legacy, the Court granted administration with will annexed de bonis non to the legatee, without requiring the representative of the executor or residuary legatees to be cited, but ordered that the sureties should justify.

MARY ANN KING, late of Drummond Road, Bermondsey, in the county of Surrey, widow, deceased, died on the 26th of May, 1870, having made her will dated the 18th of March, 1870, and thereby bequeathed a leasehold house and furniture to her sister, Amy Wood, for life, and directed that after her sister's death the same should be sold and the proceeds divided between Mary Gillam and Adelaide Judd. She also named Amy Wood, Mary Lawrence, Amelia Coxell, and Amelia Hamlin residuary legatees, and appointed John White Sears executor. The executor died without leaving any legal personal representative, and Amy Wood and the other residuary legatees were also dead, and, though numerous inquiries had been made, no representative of the executor or residuary legatees could be discovered who would be entitled to the grant, and Mary Gillam and Adelaide Judd had agreed to sell the house, but the purchase could not be completed without a representative of the estate of the testatrix.

Searle, on their behalf, moved that letters of administration with the will annexed de bonis non of Mary Ann King be granted to Mary Gillam. The representative of the executor or residuary

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legatees could not be found except at great expense, and the property to be distributed is very small—under 200*l.*

SIR J. HANNEN (President). The value of the property is immaterial, but as the will has been proved, and the estate now to be distributed is ascertained, I think it will be safe to grant the motion, but I must require justifying security.

Motion granted.

Solicitors: *Hicklin & Washington.*

R. A. P.

BIRCH *v.* BIRCH.

April 24.

Sequestration—Indian Officer's Pension.

The pension of an officer in the Indian army is not liable to sequestration for payment of costs and permanent maintenance.

THIS was a suit in which the wife had obtained a decree of dissolution of marriage, with costs and an order for maintenance at the rate of 11*l.* 9*s.* 6*d.* a month. The sum of 148*l.* 9*s.* 1*d.* being due for costs and arrears of maintenance, a writ of sequestration was issued on the 6th of March, 1883. The respondent is a lieutenant-colonel in her Majesty's Indian army, and had been permitted to retire on a pension of 359*l.* 12*s.* 6*d.* a year, and to commute one-third of such pension.

April 4. *Middleton*, for the petitioner, moved the Court to restrain the respondent or his agents from receiving the pension, or any part thereof or any moneys arising from a commutation, and that the sequestrators be authorized to receive the same until the sum of 148*l.* 9*s.* 1*d.* had been paid: *Dent* v. *Dent* (1); *Willcock* v. *Terrell* (2); *Sansom* v. *Sansom.* (3)

Beddall, contrà. The pension cannot be assigned, and therefore the Court has no power to make the order: the Army Act, 1881, s. 141; the Pension Act, 1871, No. XXIII., s. 12 (Indian). (4)

Cur. adv. vult.

(1) Law Rep. 1 P. & D. 366.
(2) 3 Ex. D. 323.
(3) 4 P. D. 69.
(4) The material portions of these sections are quoted in the judgment.

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BIRCH v. BIRCH.

April 24. SIR J. HANNEN (President). The petitioner has obtained a decree of dissolution of her marriage with the respondent, on the ground of adultery and desertion. The respondent was ordered to pay the costs amounting to 91*l.* 1*s.* 7*d.*, and was also ordered to pay by way of permanent alimony to the petitioner the sum of 11*l.* 9*s.* 6*d.* per month. He has not obeyed either of these orders, and a writ of sequestration issued against him on the 6th of March last.

The respondent is a retired lieutenant-colonel in Her Majesty's Indian army, and is in receipt of a pension of 359*l.* 12*s.* 6*d.* per annum. Application was made to me to restrain the respondent from receiving this pension, on the authority of the case of *Willcock* v. *Terrell.* (1) In that case the pension of the defendant was for past services as a county court judge, and the Court was of opinion that it was assignable by the person entitled to it, and being so assignable, that it was liable to be attached in the manner there adopted. That appears to be the principle on which the judgments of the Court below and of the Court of Appeal proceeded. In the present case, however, the respondent's pension, though for past services, is not assignable.

It was admitted that it came within the operation of s. 12 of Act of No. XXIII. of 1871, the Pensions Act, 1871 (Indian), by which it is enacted that "all assignments, agreements, orders, sales, and securities of every kind, made by the person entitled to any pension" (inter alia for past services) "in respect of any money not payable at or before the making thereof, on account of any such pension . . . or for giving or assigning any future interest therein, are null and void;" and by the Army Act, 1881, s. 141, it is enacted that "every assignment of and every charge on . . . any deferred pay . . . payable to any officer . . . of any of Her Majesty's forces, or any pension . . . payable to any such officer . . . shall, except so far as the same is made in pursuance of a royal warrant for the benefit of the family of the person entitled thereto, or as may be authorized by any Act for the time being in force, be void."

It thus appears that both by the Indian Act and the Imperial Act this pension cannot be assigned, and it is to be presumed

(1) 3 Ex. D. 323

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that this prohibition was enforced in order that a military pension of this kind should be placed on the same footing as half-pay, or as an allowance for maintenance to a public civil officer such as was in question in the case of *Wells* v. *Foster*. (1) The ground, therefore, of the decision in *Willcock* v. *Terrell* (2) is found wanting in this case, and I am of opinion that this Court ought not by its order indirectly to make a pension assignable which the legislature has declared shall not be so. I am therefore reluctantly compelled to hold that I cannot make any order restraining the respondent from receiving this pension.

Solicitors for petitioner: *Waddilove & Nutt.*
Solicitor for respondent: *William Rogers.*

R. A. P.

IN THE GOODS OF M. E. J. ATKINSON, DECEASED.

May 2.

Probate—Mistake—Inconsistent Attestation Clause.

In an attestation clause of a third codicil it was stated by mistake that the first codicil was cancelled :—

Held, that an attestation clause forms no part of a codicil, and that therefore the first codicil must be admitted to probate.

MABELLA ELIZA JANE ATKINSON, spinster, deceased, made her will with three codicils. The will and codicils were all written upon the same sheet of paper. The will was dated the 20th of March, 1876, and the first codicil the 3rd of March, 1877. The second codicil contained the figures 22/78 interlined, and this interlineation was referred to as such in the attestation clause, which however bore the date the 3rd of October, 1878. The third document was dated the 22nd of July, 1878. It began thus: "This is a third codicil to my will dated the 20th of March, 1876," and was dated at the end the 22nd of July, 1878, and the attestation clause was as follows: "Signed by the said Mabella Eliza Jane Atkinson, as a third codicil to her will, by which the first codicil is cancelled in the presence of us both present at the same time, who in her presence, at her request, and in presence of each

(1) 8 M. & W. 149. (2) 3 Ex. D. 323.

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other, herewith subscribe our names as witnesses." The attestation clause was in the handwriting of the deceased, and the codicil was duly executed. The will bequeathed (amongst other things) to her sister some Virginian bonds, subject to the payment of the deceased's debts. The first codicil only exonerated the bonds from liability to pay the debts, and provided another fund for that purpose, and confirmed the will. The third codicil recited that the bonds had been sold, and the deceased, in lieu of them, thereby gave her sister 100*l.* and disposed of the residue of her moneys.

An affidavit by one of the attesting witnesses to the third codicil stated that the first and second codicils were written and signed before the execution of the third codicil, and that the third codicil was executed in July, 1879, and not in July, 1878.

Bargrave Deane, for the executors, moved the Court for probate of the will, and all the codicils. The date, the 22nd of July, 1878, of the last codicil is a mistake for the 22nd of July, 1879. The words in the attestation clause, "by which the first codicil is cancelled," have no operation.

SIR J. HANNEN (President). I think the suggestion that the first codicil is revoked must be rejected. It is immaterial that the attestation clause is written by the testatrix, and whether written by her or anybody else it is only an interpretation put upon the codicil which the testatrix was then about to execute, and forms no part of the codicil. The words must be rejected, and all the three codicils will be admitted to probate. As, however, I have only granted probate on motion, it is competent to any one who may be prejudiced by the order to take the necessary proceedings hereafter to dispute it.

Solicitors: *Western & Sons.*

R. A. P.

IN THE GOODS OF LUCY C. MILLER, Deceased.

1883
June 26.

Will—Probate of Will Abroad—Probate of Codicil.

If a will has been proved abroad, probate of the codicils, if any, must be granted by the Court which granted probate of the will.

Lucy Cuming Miller, late of St. John, in the island of Antigua, and of Moira House, Southampton, in the county of Southampton, deceased, died on the 20th of March, 1881, having made her will, dated the 9th of March, 1878, probate of which was, on the 4th of July, 1881, granted by the Supreme Court of the Leeward Islands. After the probate had been granted, it was discovered that the deceased on the 29th of August, 1879, made a codicil which had been duly executed, but which could not now be found. An exemplification of the will having been forwarded to this country

Phillimore, for the attorney of the executors, moved that probate of a duly authenticated copy of the codicil might be granted by this Court to the attorney of the executors. It is not desirable to prove the copy codicil, in the first instance, in Antigua, as the proofs with regard to it are in this country.

Sir J. Hannen (President). It is the practice of this Court to require that codicils must be proved in the Court from which the probate of the will has been obtained. I must therefore refuse this motion, and leave the applicant to obtain probate of the codicil at Antigua.

Solicitors: *Freshfields & Co.*

R. A. P.

1883
May 8.

IN THE GOODS OF HARRIET AYRES.

Administratrix—Married Woman—Administration Bond—Consent of Husband.

Since the Married Women's Property Act, 1882, when a married woman is administratrix it is not necessary that her husband should join in the administration bond.

HARRIET AYRES, late of No. 29, Market Street, Paddington, in the county of Middlesex, deceased, died on the 23rd day of January, 1883, intestate, a widow, without child, leaving her surviving her mother, Harriet Dearing, and three sisters, and property amounting in value to 16*l.* 13*s.* 1*d.*

Harriet Dearing applied for letters of administration of the estate, and had, together with a surety, executed the usual administration bond, when it was discovered in the registry that she was a married woman and that her husband had not joined in the bond. The husband refused to join.

R. Hughes moved the Court to order the grant to issue upon the present bond.

By the Married Women's Property Act, 1882, sects. 1, 5, and 24 (1), the applicant may acquire, hold, and dispose of this pro-

(1) The following are the sections referred to:—

Section 1 (1). A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing, by will or otherwise, of any real or personal property as her separate property in the same manner as if she were a feme sole, without the intervention of any trustee.

(2.) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract, or in tort, or otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her. . . . .

(3.) Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shewn.

S. 5. Every woman married before the commencement of this Act shall be entitled to have and to hold, and to dispose of in manner aforesaid as her separate property, all real and personal property, her title to which whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any

perty as her separate estate, and the husband has no rights or liability with respect to it. 1883

IN THE GOODS OF HARRIET AYRES.

SIR J. HANNEN (President). The sections that have been referred to satisfy me that a husband incurs no responsibility by reason of his wife accepting the office of administratrix, and as the grant confers no benefit upon him, the reason for the old practice fails and his concurrence is no longer necessary.

Motion granted.

Solicitors: *Masterman, Hughes, Masterman, & Rew.*

R. A. P.

IN THE GOODS OF BLECKLEY, DECEASED. *April* 18.

Revocation of Will—Revocation of Codicil.

T. M. B. having executed a codicil at the foot of his will, cut off his signature to the will. Upon proof that he thereby intended to revoke the codicil the Court held that the codicil was also revoked.

THOMAS MACDOUGALL BLECKLEY, M.D., C.B., late a Brigade Surgeon in Her Majesty's army, deceased, died on the 23rd of November, leaving a widow and infant children.

The deceased had made a will dated the 29th of December, 1875, by which after appointing executors and giving certain specific legacies, he bequeathed his property to trustees in trust for his wife for life, and after her death for the children of the marriage. He also made a codicil dated the 13th of May, 1880,

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wages, earnings, moneys, and property so gained or acquired by her as aforesaid.

S. 24. The word "contract" in this Act shall include the acceptance of any trust or of the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee or executrix, or administratrix, either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration. The word "property" in this Act includes a thing in action.

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IN THE GOODS OF BLECKLEY.

by which he appointed a different executor, and in all other respects confirmed his will. The codicil was written at the foot of the will and upon the same sheet of paper.

In October, 1882, he had directed another will to be prepared, but it never was executed, and on the 18th of that month he revoked the will by cutting off his signature thereto, but did not in any way mutilate the codicil. It appeared, however, from the affidavit, that the deceased believed that by destroying the will he had also destroyed the codicil, and on his death bed he told his wife that he would die intestate, and gave her directions accordingly.

Bayford moved for letters of administration as in the case of intestacy: *In the goods of Turner.* (1)

SIR J. HANNEN (President). The question whether the deceased meant to revoke this codicil depends upon the intention to be gathered from the circumstances of the case, and they satisfy me that he meant to revoke both the will and codicil.

Motion granted.

Solicitors: *Tompson, Pickering, Styan, & Neilson.*

(1) Law Rep. 2 P. & M. 403.

R. A. P.

PARKER AND ANOTHER *v.* FELGATE AND TILLY. 1883
July 7.

Will—Capacity.

If a testatrix has given instructions for her will, and it is prepared in accordance with them, the will will be valid though at the time of execution the testatrix merely recollects that she has given those instructions but believes that the will which she is executing is in accordance with them.

THE plaintiffs, as executrix and executor, propounded the will dated the 29th of August, 1882, of Georgina Annie Stephens Compton, late of No. 16, Upper Gloucester Place, Dorset Square, widow, deceased, who died on the 2nd of September, 1882.

The statement of claim stated (amongst other things) that the will was signed "for the said deceased by Mary Ann Flack in the presence of and by the direction of the deceased." The defendants William Felgate, the father of the deceased, and John Tilly, the assignee in bankruptcy of the father and brother of the deceased, pleaded separately that the will was not duly executed, that the deceased was not of sound mind, memory, and understanding at the time of the execution of the will, and that she did not know and approve of the contents of the will.

It appeared that the deceased, who was about twenty-eight years of age, became early in the year 1882 affected with Bright's disease, and consulted her solicitor, Mr. Parker, as to making her will. There were various interviews between them, at which she eventually instructed him to give, besides other legacies to other persons, the sum of 500*l.* to her father, and 250*l.* to her brother, and to leave the residue of her property to the Hospital for Sick Children in Great Ormond Street. She had previously advanced moneys to her father and brother to prevent their becoming bankrupt, and in the course of the interviews with her solicitor she had instructed him to be careful to secure those legacies to them in case they should become bankrupt. She was possessed of property amounting in value to about 3500*l.*

Before the will was finally prepared the deceased became very ill, and Mr. Parker being away from home, his partner, Mr. Ponsford, prepared a will from instructions derived from

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conversations with Mr. Parker and from a draft will and draft bill of costs for preparing the will. From these instructions he had introduced a clause in contemplation of the bankruptcy of the father and brother, and also a clause providing that if the charity were unable to take its legacy the residue should be distributed amongst the next of kin of the deceased. The jury found that the deceased had authorized the insertion of these two clauses. The other issues are fully set forth in the judgment.

E. Clarke, Q.C., and *Searle*, for the plaintiffs.

Inderwick, Q.C., and *Bayford*, for the defendant Tilly, and *Dunham*, for the defendant Felgate.

SIR J. HANNEN (President), in the course of summing-up the case, said: Gentlemen, this lady, who it is to be remembered had not become seriously ill till the 26th of August—the date fixed upon as that on which coma set in—and whose mental capacity up to that day nobody disputed, appears to have had the affairs of her father and brother in her mind before her fatal illness. She had advanced them 450*l.*, and was prepared to make them a further advance if by so doing they could be enabled to satisfy their creditors. There are also very full entries in Mr. Parker's books of instructions given him for the making of a will. On the 24th of July there are instructions for making an alteration in the draft of the instrument, and there is a further alteration on the 10th of August, and then the will was engrossed, and in no respect differs from the instructions given to Mr. Parker; but, unfortunately, Mr. Parker went on his holiday, and the bankruptcy of her father and brother occurred, and the illness of the lady took a fatal turn while Mr. Parker was still away. Dr. Hickman was called in on the 18th of August, and on the 26th coma manifested itself: but Dr. Hickman said that after this Mrs. Compton was capable of being roused and could speak, and did talk about her will. It is true that the same gentleman added, "I could hardly say that she was perfectly rational;" but if she could be roused to talk, and if she could answer questions, as he said she could, these circumstances qualify the observation as to her not being perfectly rational. The coma went on increasing,

but still she could be roused, and answer general questions. This continued up to the 28th. Dr. Palmer, another of the medical gentlemen in attendance, said that after the partial coma had set in she answered questions by making signs in response. On the 29th Dr. Tanner was called in that a fresh opinion might be taken at the time when it was proposed to have the will executed. He stated that she opened her eyes, put out her hand, and smiled; that he consulted Dr. Palmer, rustled the will in front of her face, and thus roused her; that he said, "This is your will. Do you wish this lady (Mrs. Flack) to sign it?" and that she replied, "Yes." Dr. Tanner added, "I have no doubt about it;" and he further added, "As far as I could judge, she understood what she did." Mr. Willis, a gentleman who was present, and a lady who was also at the bedside, corroborated Dr. Tanner's testimony. Mrs. Flack did not hear the reply of the testatrix so distinctly, for she observed, "Does she say 'Yes?'" But another lady who was there said, "That is clear enough." A nurse, however, who stood at a further corner of the bed said that she could not hear the "Yes" distinctly, but she understood the sound to mean "Yes." It also appears from other evidence (to which his Lordship referred) that down to the 2nd of September she could be roused to consciousness by pain or discomfort, and if so it is for you to say whether she could not be roused under the influence of a desire to carry out a purpose which she had long fixed in her mind.

This being the material evidence, the law applicable to the case is this: If a person has given instructions to a solicitor to make a will, and the solicitor prepares it in accordance with those instructions, all that is necessary to make it a good will, if executed by the testator, is that he should be able to think thus far, "I gave my solicitor instructions to prepare a will making a certain disposition of my property. I have no doubt that he has given effect to my intention, and I accept the document which is put before me as carrying it out." Now, I have only put into language that which flashes across the mind without being expressed in words. Do you believe that she was so far capable of understanding what was going on? Did she at that time know and recollect all that she had done with Mr. Parker? That would

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be one state of mind. But if you should come to the conclusion that she did not at that time recollect in every detail all that had passed between them, do you think that she was in a condition, if each clause of this will had been put to her, and she had been asked, "Do you wish to leave So-and-So so much," or do you wish to do this (as the case might be), she would have been able to answer intelligently "Yes" to each question? That would be another condition of mind. It would not be so strong as the first, viz., that in which she recollected all that she had done, but it would be sufficient. There is also a third state of mind which, in my judgment, would be sufficient. A person might no longer have capacity to go over the whole transaction, and take up the thread of business from the beginning to the end, and think it all over again, but if he is able to say to himself, "I have settled that business with my solicitor. I rely upon his having embodied it in proper words, and I accept the paper which is put before me as embodying it;" it is not, of course, necessary that he should use those words, but if he is capable of that train of thought in my judgment that is sufficient. It is for you to say whether, having regard to the circumstances under which this will was prepared and executed, you accept the view of those who were present at the time, and who have given their evidence, and who say that in their judgment she was conscious.

There remains the further question as to the contents of the will. [His Lordship then referred to the evidence, and said:—] If Mr. Ponsford only inserted these clauses because he believed the testatrix would approve of them that would not be sufficient. To make the clauses good there must be either instructions previously given or the will as drawn must be afterwards acknowledged or approved. If you believe that there were such instructions, then the will only expresses her intention and carries out her instructions, and the clauses cannot be rejected.

First, tell me whether you think that at the time when the will was executed the deceased recollected all the provisions that she desired to make by her will? If you come to the conclusion that she did, then it will not be necessary to consider the other questions, but supposing you think that she did not, then do you consider that she was capable of understanding that she was

executing that will which she had given Mr. Parker instructions to make.

[The jury consulted for a short time.]

SIR JAMES HANNEN. Gentlemen, are you agreed?

The Foreman. Yes.

SIR JAMES HANNEN. Did the deceased when the will was executed remember and understand the instructions she had given to Mr. Parker?

The Foreman. No.

SIR JAMES HANNEN. Could she, if it had been thought advisable to rouse her, have understood each clause if it had been put to her?

The Foreman. No.

SIR JAMES HANNEN. Was she capable of understanding, and did she understand, that she was engaged in executing the will for which she had given instructions to Mr. Parker?

The Foreman. Yes.

The jury also found that the deceased gave Mr. Parker instructions to insert the clauses as to bankruptcy and the gift over to the next of kin, and the Court pronounced for the will, and refused to vary the result as to costs, which, therefore, followed the verdict. (1)

Solicitors for plaintiffs: *Parker & Ponsford.*
Solicitor for defendant Tilly: *W. Foster.*
Solicitors for defendant Felgate: *Royle, Foss, Smith, & Royle.*

(1) A rule nisi for a new trial was afterwards obtained on behalf of the defendant Tilly, and the case was then compromised.

R. A. P.

1883
July 10.

THE WINSTON.

Damage—Compulsory Pilotage—25 & 26 Vict. c. 63, s. 41.

The word "loading" in 25 & 26 Vict. c. 63, s. 41, does not refer to the taking on board of cargo only. Therefore when a steamer anchored in Dartmouth Harbour, and took on board twenty tons of coal for the purposes of the voyage, and was bound from a place out of the outport district to a destination also out of it:—

Held, that she was not exempt from the obligation to employ a pilot.

ACTION of damage by the owners of the *Warwick Castle* against the owners of the *Winston* for a collision which took place in Dartmouth Harbour on the 27th of September, 1882, as the *Winston* was leaving it. The defendants by their statement of defence admitted that the collision occurred through the fault of the *Winston*, but alleged that the fault was that of the pilot. They further alleged that the *Winston* was on a voyage from New York to Newcastle, that she put into Dartmouth Harbour, and anchored longside the coal hulk, from which she took twenty tons of coal for the purposes of her voyage. The same pilot had previously brought her into the harbour.. Dartmouth Harbour, it was admitted by the plaintiffs, was a Trinity outport district within the bounds of which pilotage was compulsory by law, and the owners of the *Winston* alleged that they were therefore not liable in respect of this collision.

Cohen, Q.C., and *Bucknill*, were for the plaintiff.
Phillimore, and *Raikes*, were for the defendants.

A small amount of evidence as to the circumstances of the collision was given, but the pilot was not called, and no direct evidence of any fault on the part of the crew was shewn, and it was proved that the pilot was in charge.

Phillimore argued for the defendants that by 17 & 18 Vict. c. 104, s. 376, pilotage was compulsory on the *Winston*, and that she was not exempt under 25 & 26 Vict. c. 63, s. 41, extending 17 & 18 Vict. c. 104, s. 379, subs. 6. He referred to *Muller* v.

Baldwin. (1) He also argued that it mattered not for what purpose the *Winston* was loaded, as the Act was meant to apply to all vessels coming into the port and loading. Secondly, he argued that it was immaterial to consider if there was any exemption, as by 17 & 18 Vict. c. 104, s. 388, the fact of pilotage being compulsory in the district was enough to entitle owners to protection.

[SIR JAMES HANNEN. I consider the authority of the Privy Council in *The Lion* (2) is one which I should follow, and that is against you on this last point.]

Cohen, Q.C., contrà. "Loading or discharging" must be read together; only cargo can be discharged, and therefore the section must refer only to loading cargo.

SIR JAMES HANNEN. On the question of fact I am of opinion that I must hold that this collision occurred in consequence of the fault of the pilot. He was in charge of the ship, of that there is no doubt, though an officer was on deck, and so were some of the crew to do what was necessary to execute the orders of the pilot, for the captain had given general directions that the pilot's orders were to be obeyed. Nor can any fault be found with the captain that having his ship under the care of a duly licensed pilot he should leave the charge of it to him whilst he attended to some other matters. Unless therefore some definite act is proved either done wrongly or left undone by the crew which was within their special province I cannot speculate on the subject, nor infer that the blame was not that of the pilot.

As regards the question of law I have already intimated, as to the second point raised by Dr. Phillimore, that I feel bound to follow the decision of the Privy Council, but it is really unnecessary for me to enter into it as I am in his favour on the first point. I quite agree with Mr. Cohen that there is a difficulty in discovering the policy of these separate enactments. It is possible that each enactment was passed pro re natâ according as the particular occasion for it arose. The idea at one time apparently was that when there was an anchoring there was a using of the port, but so many vessels in passing through a district have to anchor that it was felt that the definition was not satisfactory, and in this

(1) Law Rep. 9 Q. B. 457. (2) Law Rep. 2 P. C. 525.

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particular section another line of thought was carried out. Here the idea seems to be that when a vessel is passing through a district along the coast there is no reason why it should take a pilot on board; but if it makes use of the port, then that there should be no exemption from the duty of taking on board a properly licensed pilot. But in this section one only of the objects for which the port is used is referred to, though it might well have been expected that some more general phrase would have been adopted, for it is difficult to see why if the vessel comes into harbour at all she should not take on board a pilot. However, the particular expression is, "loading or discharging at any place situate within such district." In my opinion the proper construction of "loading" is that it means taking on board either cargo, or, as here, coals for the purpose of the voyage. In either case the vessel is bound to take a pilot. For these reasons I must give judgment for the defendants.

Phillimore applied for costs.
Cohen, Q.C., did not oppose the application, and

SIR JAMES HANNEN made an order accordingly.

Solicitors for plaintiff: *Parker, Garrett, & Parker.*
Solicitors for defendants: *Pritchard & Sons.*

E. S. R.

July 12.

THE CLAN MACDONALD.

Merchant Shipping Amendment Act, 1862 (25 & 26 *Vict. c.* 63), *s.* 67—*Bill of Lading—Failure of Cargo Owner to take Goods—Duty of Shipowner—Notice.*

When goods are landed under sub-s. 6, 25 & 26 Vict. c 63, s. 67, sub-s. 7, does not apply, for the latter refers only to the discharging of cargo overside, and not to the landing of it for the purposes of assortment on the wharf, and the written notice referred to in sub-s. 7 applies, therefore, to cases arising under that sub-section only.

It is the duty of the owner of goods who receives either a written or verbal notice that he can have them to take them away within a reasonable time, and that whether sub-s. 6 or 7 applies to the case.

Notice to the lighterman employed by the owner of the goods is notice to the owner himself.

A ship arrived in dock with a general cargo on the 12th of December, and

began to unload on the quay on the 13th. The plaintiffs (owners of some of the goods) sent a lighterman and barge to receive their portion of the cargo on the 13th. It was not then ready. On the 14th the lighterman again attended but could obtain no information. On the 14th the firm of lightermen wrote to the defendants (the shipowners), stating they had made application for the goods and enclosing a notice requiring twenty-four hours notice of the defendants' readiness to deliver the goods, and stating that they would not be responsible for any landing charges. On the 15th the landing of the cargo was completed, and the lighterman was that day verbally informed he could have the goods on the morning of the 16th. He did not attend, and the goods were not taken away till the 29th. The plaintiffs paid the dock charges under protest, and brought an action to recover them back:—

Held, that they could not recover them.

ACTION transferred from the City of London Court in respect of a claim arising out of an agreement made in relation to the carriage of goods in a ship.

The action was heard on the 12th of July.

Bucknill, for the plaintiffs.

Pollard, for the defendant.

The facts of the case are fully set out in the judgment of Sir James Hannen.

The following cases, in addition to that mentioned in the judgment, were referred to at the hearing: *Wilson* v. *London, Italian, and Adriatic Steam Navigation Co. Limited* (1); *Marzetti* v. *Smith & Sons* (2); *Oliver* v. *Colvill.* (3)

Cur. adv. vult.

July 23. SIR JAMES HANNEN. The plaintiffs are owners of a consignment of jute in the ship *Clan Macdonald*, under bills of lading containing the following clauses:—"500 bales of jute, to be delivered, subject to the exceptions and conditions thereinafter mentioned, from the ship's tackles." "The goods are to be discharged from the ship as soon as public intimation shall be given that she is ready to unload, and if not thereupon removed without delay by the consignee the master or agent is to be at liberty to land the same, or, if necessary, to discharge into hulk, lazaretto, or hired lighter at the risk or expense of the owners of the goods."

(1) Law Rep. 1 C. P. 61. (2) W. N. 1883, p. 119.
(3) 27 W. R. 822.

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The ship arrived at the East and West India Docks on the 12th of December, and began to unload on the 13th of December. The whole of this cargo, which was a general one, was landed on the dock quay and there sorted. Twelve of the bales of jute were landed on the morning of the 13th, and on the afternoon of that day the lighterman employed by the plaintiffs attended with a barge to receive the jute, but was informed that it was not ready, and that the whole cargo would be landed.

On the 14th the lighterman again attended, but could get no further information as to when the jute would be delivered. The cargo was then being discharged, and parcels of the jute, as they were come to, were from time to time landed on the quay and there sorted. On the 14th Messrs. Howell & Coventon, the lightermen employed by the plaintiffs, wrote the following letter to the defendants:—"We have made application at the ship *Clan Macdonald* for delivery of 500 B/ 80 B/ and 115 B/ jute marked respectively E P_3 ◇D 4 G/0, but having failed to obtain delivery or correct information of the time when delivery could be given, we have lodged on board the usual notices, duplicate of which we inclose." The inclosed notice was as follows:—"To the owners of the ship *Clan Macdonald*.—With reference to 500 bales jute per the above vessel as per particulars at foot, we hereby give you notice that in compliance with the provisions of the Merchant Shipping Amendment Act, 1862, we have made due entry and sent craft (with documents in proper order) alongside the above-named vessel, and have offered and been ready to take, delivery of the above mentioned goods, and you having failed to make such delivery and you having also failed at the time of our said offer to give us correct information of the time when such goods can be delivered, we hereby give you notice, and require you to give us twenty-four hours' notice in writing of your readiness to deliver the said goods; and, further, that we will not be responsible for any dock or landing charges on the same. And we give you further notice that in the event of any further default in making complete delivery at the proper time of the aforesaid goods, we shall claim from you 12*s.* 6*d.* per day for detention of lighterman and craft, whether such detention be

caused by your making default in delivery at the proper time of a part of such goods or of the whole quantity thereof." To this the defendants replied as follows:—"We return documents received from you this morning; the dock company state that every dispatch is being given your craft alongside our steamers *Clan Macdonald* and *Clan Mackenzie*, and further state that if any delay is caused it is on account of your not having sufficient men to receive the goods; we can therefore admit of no liability in the matter."

Some further correspondence followed, and on the 16th the defendants wrote as follows:—"Your favour of yesterday to hand inclosing documents, which we again beg to return, as we can admit of no liability in the matter. On making further inquiries of the dock company we are informed that they arranged with your man to go at 8 o'clock this morning, and that up to 12·30 neither the man or the craft had put in an appearance."

On the 15th the landing and sorting of the cargo was completed, and the plaintiffs' lighterman was informed on the afternoon of that day that the jute would be delivered to him on the following morning, and that a gang of men would be in attendance to deliver the goods into his barge. The men were in fact ready to do so, but the lighterman did not attend. If he had attended at any time during business hours on the 16th the jute would have been delivered to him free of charge, but as the goods were not taken away on the 16th, the dock company from that time held them for charges without payment of which the goods could not have been delivered. The goods were not taken away until the 29th, when the dock company's charges had amounted to 18*l.* 12*s.* This sum was paid by the plaintiffs and they now seek to recover it from the defendants. The plaintiffs contend that the defendants were bound under the terms of the bill of lading to deliver the jute over the side of the ship, and that having neglected to do so and landed the cargo, they remained liable for any charges to which the jute was subject unless they had given twenty-four hours' notice in writing that it was ready for delivery.

The defendants on the other hand allege that the cargo was discharged according to the custom of the port of London with

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regard to the discharge of vessels in dock, viz., by the cargo being unloaded by the dock company's servants, and by them landed upon the dock quay, and sorted ready for removal by the parties entitled to take delivery of goods from the vessel.

They further rely on the provisions of the Merchant Shipping Amendment Act, 1862, s. 67.

The alleged custom was not established by the evidence.

The real question in dispute between the parties, as appears from the correspondence, turns on the proper construction and application of s. 67 of the Merchant Shipping Amendment Act of 1862.

By that section it is enacted that "Where the owner of any goods imported in any ship from foreign parts into the United Kingdom fails to make entry thereof, or having made entry thereof to land the same or to take delivery thereof, and to proceed therewith with all convenient speed by the times severally hereinafter mentioned, the shipowner may make entry of and land or unship the said goods at the times, in the manner, and subject to the conditions following."

Then follow seven sub-sections setting forth various cases in which the section becomes applicable. The 6th and 7th sub-sections, which are the material ones, run thus:

(6). "If any goods are for the purpose of convenience in assorting the same landed at the wharf where the ship is discharged, and the owner of the goods at the time of such landing has made entry, and is ready and offers to take delivery thereof, and to convey the same to some other wharf or warehouse, such goods shall be assorted at landing, and shall if demanded be delivered to the owner thereof within twenty-four hours after assortment; and the expenses of and consequent on such landing and assortment shall be borne by the shipowner."

(7). "If at any time before the goods are landed or unshipped the owner thereof has made entry for the landing and warehousing thereof at any particular wharf or warehouse other than that at which the ship is discharging, and has offered and been ready to take delivery thereof, and the shipowner has failed to make such delivery, and has also failed at the time of such offer to give the owner of the goods correct information of the time at

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which such goods can be delivered, then the shipowner shall before landing or unshipping such goods under the power hereby given to him give to the owner of the goods or of such wharf or warehouse as last aforesaid twenty-four hours notice in writing of his readiness to deliver the goods, and shall if he lands or unships the same without such notice do so at his own risk and expense."

The first question which arises on this 67th section is the meaning of the words "Where the owner of any goods fails to make entry and to take delivery thereof and to proceed therewith with all convenient speed."

The words, no doubt, include a case of default on the part of the owner of goods to take delivery of them, but they also apply to cases in which the goods-owner is not in default, where he from any cause fails to obtain delivery. This is proved by the case of *The Energie*. (1) It is there said their Lordships "conceive that the word 'failed' need not be taken to imply wilful default in the cargo-owner; but that upon the true construction of the section the shipowner is at liberty to land the goods under it whenever the delivery of them to the owner within the proper time has been prevented by the force of circumstances, whether the latter is or is not to blame. They think that this contention is fortified by some of the provisions of the section, which in certain cases throw the risk and expense of the landing upon the shipowner."

In the present case I do not think that there was any wilful default of the goods-owner, but in fact he had no barge in attendance to take delivery of this jute when the first twelve bales had to be disposed of, and in considering the question which afterwards arose, it is to be remembered that if the jute had been delivered overside it would have caused the detention of the barge during the whole time that the ship was being discharged, because the bales came to hand at intervals down to the end of the three days during which the unloading was proceeding.

But I am of opinion that there was a failure on the part of the goods-owner to take delivery by the time mentioned in the 6th sub-section of the 67th section, that is, the time when it became

(1) Law Rep. 6 P. C. 306.

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necessary for the purpose of convenience and of sorting the goods to land them at the wharf. The shipowner was therefore entitled under that sub-section to land the jute at his own expense, and he became bound within twenty-four hours after assortment to deliver it to the goods-owner if demanded. This would have been on the 16th, and if the plaintiffs had demanded the goods on that day they would have received them without charge; on the other hand, it was the duty of the plaintiffs to take delivery of the goods within a reasonable time after they knew that they could receive them. This would not necessarily be on the 16th, and if the plaintiffs had been in ignorance that they could receive them on the 16th, I should not consider that their failure to demand them within twenty-four hours after their assortment would render them at once liable to the charge arising from their remaining on the dock quay. But it is clear that the failure of the plaintiffs to take delivery did not arise from ignorance that they could have the goods, but from a preconceived determination to try the question whether or not they were entitled to insist on a twenty-four hours' notice in writing under the 7th sub-section of the 67th section.

I am of opinion that where goods are landed under the 6th sub-section, the 7th is not applicable. That sub-section relates to the case of a vessel discharging overside where the necessity to land for sorting does not arise.

Even if the 7th sub-section were applicable, I do not think it would make any difference in the position of the parties. Where the several conditions imposed on the goods-owner by the 7th sub-section have been complied with, it becomes the duty of the shipowner to give the goods-owner twenty-four hours' notice in writing of his willingness to deliver the goods, with the consequence that if he lands or unships the goods without such notice he does so at his own risk and expense.

But this does not mean that the goods are to remain at his risk and expense for any time that the goods-owner thinks fit to leave them at the wharf, though he has notice that he may receive them by sending for them, and there is no necessity for this notice being in writing. The notice in writing referred to in the 7th sub-section is only required as a condition of the shipowner's

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right to land the goods at the goods-owner's risk and expense. If without this notice the goods are landed, this must be done at the shipowner's risk and expense, but the duty of the goods-owner remains to take away the goods within a reasonable time after he has notice, whether written or verbal, that he can receive them. In the present case notice was given to the lighterman on the 15th that he might have the goods on the 16th, and I have no doubt that he knowingly left the officers of the dock company under the impression that he would then come and fetch them, but being aware of the dispute which had arisen as to the necessity for a written notice he abstained from going to receive the goods.

It was contended for the plaintiffs that the lighterman was not their agent to receive notice when the goods would be ready for delivery, but I am of opinion that as he was sent by the plaintiffs to receive the goods, information as to the time when they would be delivered was so connected with the service for which he was employed, that the plaintiffs are bound by the notice given to him. But in any case the letter of the 16th did give the plaintiffs notice that they could receive the goods by sending for them. The plaintiffs were bound to act on this notice within a reasonable time, but the correspondence shews that the plaintiffs refused to act upon this or any notice other than some special twenty-four hours' notice in writing to which they considered themselves entitled under the 7th sub-section. The charges, therefore, to which the goods became subject, arose, not from the plaintiffs' ignorance of the time when they could receive the goods, but from their voluntarily allowing them to become and remain subject to charges in order that they might test their view of the law, in which I consider they are mistaken.

I am therefore of opinion that the defendants are entitled to judgment with costs.

Solicitors for plaintiffs: *J. A. & H. E. Farnfield.*
Solicitors for defendants: *Freshfields & Williams.*

E. S. R.

1883
June 6.

FREEGARD *v.* FREEGARD, COWPER, & LUCAS.

Dissolution of Marriage—Bigamy of Petitioner.

A husband believing that his wife was dead married again, and subsequently discovered that his wife was alive and had committed adultery :—

Held, that, notwithstanding the bigamy, he was entitled to a dissolution of his marriage.

THIS was a husband's petition for dissolution of marriage by reason of the respondent's adultery with the co-respondents and a man unknown. The respondent denied the adultery, and alleged that the petitioner had been guilty of cruelty, bigamy, and adultery.

The petitioner, a managing clerk to a firm of solicitors, married the respondent in 1849, and there had been six children issue of the marriage. In the year 1873 he was compelled to separate from her by reason of her habits of intoxication and extravagance, and he made her an allowance, but from the year 1876 to 1880 he never saw nor heard of her. On the 26th of September, 1880, having read an account of an inquest upon a woman who had been found drowned in Hackney Marshes, and who appeared to be his wife, he went to the mortuary and identified the body as his wife's, and his son and daughter and a person named Alsop, who knew the respondent, also identified it. In the belief that his wife was dead, the petitioner, in December, 1880, married another woman, but on the 2nd of July, 1882, the respondent again appeared. The petitioner thereupon separated from the person whom he had married, and caused inquiries to be made as to the mode in which his wife had been living, and having discovered the adultery alleged instituted this suit. Neither of the co-respondents appeared.

Inderwick, Q.C., and *Searle*, for the petitioner.
Hall, Q.C., for the respondent.

BUTT, J. I am satisfied that the adultery of the respondent has been established. The counter-charge of cruelty has not been proved. As to the bigamy, the petitioner when he married a

second time had good reasons for believing, and believed, that his wife was dead, and as soon as he discovered his mistake he separated from the person he had so married, and has not lived with her since. Under these circumstances, I am of opinion that I ought not to deprive him of the dissolution of his marriage, to which he is entitled by reason of the adultery of his wife.

Decree nisi.

Solicitors for petitioner: *Lewis & Lewis.*
Solicitor for respondent: *G. H. Hall.*

R. A. P.

MILLAR *v.* MILLAR.

June 8.

Judicial Separation—Desertion by Wife.

Judicial separation decreed by reason of the wife's desertion of her husband for two years and upwards without reasonable cause.

THIS was a petition by a husband for judicial separation by reason of his wife's desertion of him for two years and upwards without reasonable cause.

The parties were married on the 18th of April, 1878, at the registry office, Hackney, and lived together until the month of August following, when the petitioner, who was a supervisor in the Inland Revenue, was ordered to Ireland, and then to Halesworth in Suffolk. On his return from each of these places he resumed cohabitation with his wife, and in May, 1879, they were living at Royston when the respondent left him against his wish and returned to her relatives in Scotland. He wrote frequently to her, and also went to Scotland himself and urged her to return, but she refused and had ever since remained away from him.

Bayford, for the petitioner, proved the facts, and cited s. 16 of the first Divorce Act. (1)

The respondent did not appear.

(1) The following are the material parts of the section: "A sentence of judicial separation . . . . may be obtained either by the husband or the wife on the ground of . . . . desertion without cause for two years and upwards."

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BUTT, J. The requirements of the Act of Parliament have been fulfilled, and the petitioner is therefore entitled to the relief which he seeks.

Judicial separation decreed, with costs.

Solicitors for petitioner: *Walker, Son, & Field.*

R. A. P.

June 26.

[IN THE COURT OF APPEAL.]

ELLIS *v.* ELLIS.

Divorce — Dissolution of Marriage — Decree Nisi — Alimony pendente Lite — 20 & 21 Vict. c. 85, s. 32 — 23 & 24 Vict. c. 144, s. 7.

The Court has power to order alimony pendente lite notwithstanding a decree nisi has been made for dissolution of marriage.

Latham v. *Latham* (2 Sw. & Tr. 298) overruled.

ON the 27th of October, 1882, Mrs. Ellis filed a petition for dissolution of marriage on the ground of her husband's adultery and cruelty. An appearance having been entered by the husband, Mrs. Ellis filed a petition for alimony pendente lite. The petition was referred to the registrar, but in consequence of a pressure of business the matter did not come before him until after the 21st of November, 1882, when Sir J. Hannen made a decree nisi for dissolution of marriage.

On the 22nd of January, 1883, when the petition came before the registrar, he refused to make any order for alimony pendente lite, on the ground that a decree nisi if not appealed from puts an end to the suit between the parties.

On the 17th of April the matter was brought before Sir J. Hannen, who reversed the registrar's decision, and held that Mrs. Ellis was entitled to alimony, and referred the question of amount to the registrar.

From this order Mr. Ellis, the husband, appealed.

The appellant appeared in person. An order for alimony pendente lite cannot be made after decree nisi for dissolution of marriage, for the action is then at an end: *Latham* v. *Latham* (1); Pritchard's Law of Divorce Court, p. 25.

(1) 2 Sw. & Tr. 299.

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McCall, and *Guiry*, for Mrs. Ellis. In *Laxton* v. *Laxton* (1) the same judge who decided *Latham* v. *Latham* (2) expressed a doubt whether it was rightly decided. In *Norman* v. *Villars* (3) it was held that the status of a married woman is not altered by the decree nisi. Alimony pendente lite is given to prevent the wife pledging her husband's credit. It is only after the decree absolute that the Court can make a permanent allowance. It is only on the ground of delay that alimony pendente lite is refused: and there was no delay here: *Noblett* v. *Noblett*. (4)

The appellant, in reply.

COTTON, L.J. I think the order in the present case was right. The 32nd section of 20 & 21 Vict. c. 85, gave the Court power if it should think fit on any decree for dissolution of marriage to order the husband to make a permanent allowance for the divorced wife. But the subsequent statute 23 & 24 Vict. c. 144, s. 7, made this alteration, that only a decree nisi was to be pronounced in the first instance, and it was to become absolute after six months unless cause was shewn, and that on cause being shewn the Court should deal with the case by making the decree absolute, or by reversing it, or by directing further inquiry. So that until the decree becomes absolute the parties are still husband and wife and the marriage is not severed. It is true that the respondent cannot do anything in the matter after the decree nisi except by applying for a new trial, but the decree is not final and the suit is not at an end. The question we have to deal with is whether during the period between the decree nisi and the final decree alimony can be granted. Until the final decree the Court can make no permanent provision for the wife; therefore it seems reasonable that it should have power to make some temporary provision. For this reason, independently of authority, I should come to the conclusion that the order appealed from was right. The case of *Latham* v. *Latham* (2) is no doubt an authority against it, but that is not binding upon us. If it had been generally followed it might not have been right to disturb the practice. But it is not so. In *Laxton* v.

(1) 30 L. J. (P. & M.) 208.
(2) 2 Sw. & Tr. 299.
(3) 2 Ex. D. 359.
(4) Law Rep. 1 P. & M. 651.

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Laxton (1) the same judge who decided *Latham* v. *Latham* (2) seems to have doubted its correctness, and said that it ought to be considered again. *Laxton* v. *Laxton* (1) is an authority for the view that an application for permanent alimony before the final decree is premature. Therefore I think we are justified in overruling *Latham* v. *Latham* (2) and in dismissing this appeal.

BOWEN, L.J. I am of the same opinion. Reason and common sense are in favour of Sir J. Hannen's decision. It is clear that alimony pendente lite may be given till the decree nisi and permanent alimony after the decree is made absolute. What is to be done during the interval? That the wife should be deprived of her alimony during that period would be most unreasonable. The decision in *Latham* v. *Latham* (2) appears to me unsound on principle and contrary to the Act of Parliament. If it had been followed in practice I might have found a difficulty in disturbing it; but it came before the same judge in *Laxton* v. *Laxton* (1), and he then certainly doubted its validity. In the latter case it was decided that it was premature to ask for permanent alimony before decree absolute; and the judge was driven, as a logical consequence, to doubt the decision in *Latham* v. *Latham*. (2) Still that case was not actually overruled by *Laxton* v. *Laxton* (1), and it is said to have been treated by the registrars as a correct decision. The question never came again formally before the Court, though the decision in *Norman* v. *Villars* (3) that the legal status of a married woman remains until the decree absolute throws light on it. Now, however, it has come before the Court, and the learned judge who now fills Sir C. Cresswell's place, and who so well understands the law on these subjects, has gone back to the reasonable view, and I think he was right. The appeal must, therefore, be dismissed with costs.

Solicitors for respondent: *Indermaur & Clark.*

(1) 30 L. J. (P. & M.) 208. (2) 2 Sw. & Tr. 299.
(3) 2 Ex. D. 359.

M. W.

[IN THE ARCHES COURT OF CANTERBURY.]

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THE OFFICE OF THE JUDGE PROMOTED BY MARTIN *v.* MACKONOCHIE. (THIRD SUIT.)

Church Discipline Act (3 & 4 *Vict. c.* 86)—*Offences against Ritual—Resignation of Benefice pending a Suit—Operation of Sentence of Deprivation.*

The ordinary sentence of deprivation in use in the ecclesiastical courts is not limited to the particular preferment or benefice stated in the articles to be held by the respondent, but extends to all ecclesiastical promotions within the jurisdiction held by the respondent at the time that sentence is pronounced.

It is contrary to the practice of the Court of Arches to pronounce a sentence of perpetual suspension from the performance of divine service against a respondent who holds a benefice of which the Court has jurisdiction to deprive him.

The articles in a criminal suit by letters of request under the Church Discipline Act contained allegations charging that the respondent was perpetual curate of the parish of A., in the diocese of London, and that he had within two years of the institution of the suit committed repeated and aggravated offences against the laws ecclesiastical in matters of ritual whilst officiating in the performance of divine service in the parish church of A. At the hearing of the suit the above-mentioned allegations were held to be proved, and the Official Principal, in his discretion, condemned the respondent in costs, but refused to pronounce any sentence of deprivation or canonical punishment. The promoter appealed, and the appeal having been allowed the Queen in Council remitted the cause, with an intimation that the respondent ought to be canonically punished. After the cause had been so remitted, but before the terms of the remission had been complied with, the respondent resigned the perpetual curacy of A. and was instituted to the incumbency of P. in the diocese of London.

On the cause subsequently coming on for sentence, the Official Principal of the Court of Arches pronounced sentence depriving the respondent of all the ecclesiastical promotions within the province of Canterbury of which he was possessed when the sentence was pronounced and of all the ecclesiastical emoluments thereto belonging.

IN this case letters of request, signed by the Bishop of London in the first instance under the Church Discipline Act, were accepted by the Official Principal of the Arches Court on the 17th of January, 1880, and thereupon a decree, by letters of request, issued out of the registry citing the Rev. Alexander Heriot Mackonochie, incumbent and perpetual curate of the new parish of St. Alban's, Holborn, in the diocese of London, to appear to and answer certain articles to be exhibited to him at

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the promotion of John Martin of New Square, Lincoln's Inn. The decree, by letters of request, was duly served, but no appearance was entered by Mr. Mackonochie or any proctor or solicitor on his behalf, and on the 16th of February, 1880, the proctors for the promoter brought in articles which, with the exception of one article, were, after some slight amendment, admitted to proof on the 8th of March, 1880. The articles so admitted to proof are fully set out in the case of *Martin* v. *Mackonochie*. (1) It is sufficient for the purposes of the present report to state here that they alleged that the respondent was at the date the articles were filed a clerk in holy orders of the Church of England, and during the whole of the two years next before the commencement of the suit, subject to a certain sentence of suspension for three years from the discharge of his clerical offices referred to in the articles as pronounced against him by the then Official Principal of the Arches Court on the 1st of June, 1878, and published on the 23rd of November, 1879, incumbent and perpetual curate of the new parish of St. Alban's, in the diocese of London, and that within two years before the commencement of the suit he had, whilst officiating in the performance of divine service in his church of St. Alban's, Holborn, committed repeated and aggravated offences against the laws ecclesiastical in matters of ritual. The articles concluded with a prayer which, so far as material, was as follows:—"The proctors for the promoters pray that on due proof of the premises this Court will be pleased to pronounce that the said A. H. Mackonochie has offended against the law ecclesiastical in the matters alleged in the articles, save one or more of them, and that he may be deprived of all his ecclesiastical promotions within the province of Canterbury, and especially of the vicarage or perpetual curacy of the new parish of St. Alban's, Holborn, and of any other ecclesiastical promotions within the province of Canterbury whereof he may be possessed, and of and from the glebe, fruits, tithes, rents, salaries, and all other ecclesiastical dues, rights, and emoluments whatsoever belonging and appertaining to his said ecclesiastical promotions within the province of Canterbury, or may be otherwise canonically punished according to the gravity of his offence and the

(1) 6 P. D. 87.

exigency of the law, and be condemned in the costs hereby incurred or to be incurred on the part of the said John Martin and compelled to the due payment thereof."

On the 10th of April, 1880, the suit came on for hearing before the Official Principal of the Arches (the Right Honourable Lord Penzance), and the proctors for the promoter produced evidence in support of all the articles admitted to proof save and except the 12th, 22nd, and 23rd articles, which were abandoned by him (1), and on the 5th of June, 1880, the Official Principal of the Arches pronounced and decreed that the proctors for the promoter had sufficiently proved the contents of the articles as to which they had produced evidence, and condemned the respondent in costs; but refused the prayer made by the proctor for the promoter, that the Court would pronounce the sentence of deprivation prayed for by the articles, or would otherwise canonically punish the respondent. (2)

From this decree the promoter appealed, but only in so far as the Judge of the Arches did not decree that the respondent had offended against the laws ecclesiastical, and did not pronounce that the respondent be deprived of all his ecclesiastical promotions within the province of Canterbury, and especially of the perpetual curacy of St. Alban's, Holborn, or be otherwise canonically punished. On the 22nd of February, 1882, the Judicial Committee of the Privy Council allowed the appeal (3), reporting to the Queen in Council that the decree in respect of which it had been brought ought to be reversed in so far as thereby the Judge of the Arches refused to decree that the Rev. A. H. Mackonochie ought to be deprived of his ecclesiastical promotions within the province of Canterbury, or be otherwise duly and canonically punished; that the said Rev. A. H. Mackonochie ought by a decree of the Arches to be pronounced to have offended against the laws ecclesiastical, and ought to be duly and canonically

(1) These articles are set out in the case of *Martin* v. *Mackonochie* (6 P. D. 91, 92). They related to a charge made against the respondent of officiating in the church of St. Alban's, Holborn, in violation of the sentence of suspension decreed against him by the Court of Arches on the 1st of June, 1878.

(2) See 6 P. D. 94, where the reasons for the decision of the Court will be found at length.

(3) The proceedings on the appeal are reported at length 7 P. D. 94.

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punished as to the Court of Arches should seem just. And further, that the cause ought to be remitted with all its incidents to the Court of Arches, with an intimation that such further proceedings should be taken in it as might be necessary to carry the recommendation of the Judicial Committee of the Privy Council into effect. On the 27th of February, 1882, the Queen in Council ordered the report to be carried into execution. Accordingly, a remission under the seal of Her Majesty's Court of Appeals, authorizing and commanding the Official Principal of the Arches to resume the cause into his hands and to proceed therein according to law, and the tenor of the recommendation of the Judicial Committee of the Privy Council issued on the 13th of March, 1882, was brought into the registry of the Arches Court on the 16th of the same month, and on or about the 21st of July, 1882, the proctors for the promoter gave notice that the remission would be exhibited before the Judge of the Arches, and the Judge would be prayed to proceed in the suit and to pronounce sentence therein in accordance with the terms of the remission.

1883. April 12. *Dr. Deane, Q.C.*, and *Jeune* (*Sir H. James, A.G.*, with them), moved the Court to pronounce that the respondent had offended against the laws ecclesiastical as alleged in the articles, and that he be deprived of all his ecclesiastical promotions within the province of Canterbury, and especially of the vicarage or perpetual curacy of St. Peter's, London Docks, and of any other ecclesiastical promotions within the province of Canterbury whereof he might be possessed, and of and from the glebe, tithes, rents, fruits, salaries, and all other ecclesiastical deeds, rights, and emoluments whatsoever belonging and appertaining to his said ecclesiastical promotion within the province of Canterbury, or that he might be otherwise duly and canonically punished as should to the judge seem meet. They stated that the motion had stood over from the previous July, in consequence of the proceedings in prohibition in the case of *Combe* v. *De la Bere* (1); that the Court of Appeal had recently given a decision in that case in favour of the jurisdiction of the Court of Arches: see W. N. for 1882, p. 170, thus enabling the motion to be brought on; but

(1) 31 W. R. 24.

that whilst the motion stood over Mr. Mackonochie on or about the 1st of December, 1882, had resigned the living of St. Alban's, Holborn, and had been instituted to and was then possessed of the incumbency of St. Peter's, London Docks, in the diocese of London.

[LORD PENZANCE. There is nothing before the Court to shew that Mr. Mackonochie has resigned the living of St. Alban's, Holborn, or that he has been instituted to another benefice in the province of Canterbury. I think some evidence should be produced as to Mr. Mackonochie's voluntary resignation of the benefice he formerly held, and as to his fresh preferment in the diocese of London. The requisite evidence can be given in an affidavit to be brought into the registry after the motion has been heard.]

Assuming, then, for the purpose of argument that Mr. Mackonochie is no longer the incumbent of St. Alban's, Holborn, but since the hearing of the suit has become possessed of the benefice of St. Peter's, London Docks, within the jurisdiction of the Court, the question arises whether in the circumstances, and having regard to the terms of the remission, the Court will pronounce against Mr. Mackonochie the sentence of deprivation asked for by the motion, or "will otherwise canonically punish him." There is no direct precedent as to the proper sentence to be passed under the circumstances of this case. Such a sentence as was passed in the case of *Hodgson* v. *Oakley* (1) seems peculiarly applicable. [They also referred to Coote's Ecclesiastical Practice, p. 245; *Hussey* v. *Radcliffe* (2); *Noble* v. *Voysey* (3); *Burgoyne* v. *Free* (4); *Kitson* v. *Loftus* (5); *Woodward* v. *Attwood* (6); Rothery's Collection of Precedents in Ecclesiastical Cases, No. 48]. If, however, the Court should be of opinion that a perpetual suspension is not the sentence which it ought to pronounce in the present case, then the promoter asks that Mr. Mackonochie be deprived of the benefice he now holds, and of the rights and emoluments appertaining to it. It cannot be that Mr. Mackonochie

(1) 4 N. of C. 180; 1 Robertson, 322.
(2) 5 Jur. N. S. 1014.
(3) Law Rep. 3 P. C. 357.
(4) 2 Hagg. 456.
(5) 4 N. of C. 323.
(6) Roth. Col. of Prec. in Eccl. Cas. No. 48.

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can escape the consequences of having offended against the ecclesiastical laws by voluntarily resigning the benefice he held when the suit commenced. It is true that the offences articled against him were committed whilst he was incumbent of St. Alban's, Holborn, and the prayer of the articles is therefore directed more especially to obtaining a sentence depriving him of that benefice, but the circumstance that the prayer in question, as has been the usual practice, prays also deprivation "of any ecclesiastical promotion within the province of Canterbury whereof he may be possessed," shews conclusively that the jurisdiction is not merely confined to a power to deprive him of the benefice of St. Alban's, Holborn, and that the suit was not brought to an end by his voluntary resignation.

[Notice of the motion had been duly served on Mr. Mackonochie, and he was thrice called into Court, but he did not appear either in person or by counsel.]

Cur. adv. vult.

June 9. By direction of the Court the motion was again brought on.

Dr. Deane, Q.C., and *Jeune*, appeared for the promoter.

LORD PENZANCE. I should state that the reason of this case coming before the Court to-day is at my instance. On the last occasion when the case was before the Court, the learned counsel for the promoter stated in argument that the sentence which the promoter submitted the Court ought to pass against Mr. Mackonochie was a sentence of perpetual inhibition against the performance by him of divine service within the province of Canterbury.

The case has been remitted to me by the Queen in Council, with directions to me to use my discretion in subjecting the defendant to such ecclesiastical punishment as I may think he deserves. Since the remission the defendant, as has been the case throughout all the previous proceedings against him, has never appeared, and I have, virtually, to be his counsel, and certainly, as far as deserving censure is concerned, the inhibition asked for is by no means an excessive punishment to award in respect

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of his numerous offences. But when I came to consider further the matters which had been discussed when the case was before me, I found a difficulty in doing what I had been asked to do. The articles in the suit contained a prayer praying that Mr. Mackonochie should be deprived of all his ecclesiastical promotions within the province of Canterbury, and especially of the vicarage or perpetual curacy of the new parish of St. Alban's, Holborn, and of any other ecclesiastical promotions within the said province of Canterbury whereof he may be possessed, and of and from the glebe, fruits, tithes, rents, salaries, and all other ecclesiastical dues, rights, and emoluments whatsoever belonging and appertaining to his said ecclesiastical promotions within the said province of Canterbury whereof he is possessed.

This was the prayer which, for reasons which it is not necessary for me to state, I originally thought I ought not to grant; but it then occurred to me that it was not right, and that indeed it was contrary to common sense, that when the Court had the power to withdraw a benefice from an offender it should leave him in possession of it, and yet perpetually inhibit him from performing the duties of his office. It appeared to me that to pass such a sentence of inhibition on a beneficed clergyman would be hard both to the parish and the patron, as well as to the person inhibited himself. And when I came to look at the case of *Hudson* v. *Oakley* (1), which had been quoted to me as a precedent in favour of such an inhibition being passed in the present case, I found that was the case of a licensed curate and not of a defendant who held a benefice, a circumstance which explains the order made by the Court in that case. I then looked at the form of perpetual inhibition given in Coote's Ecclesiastical Law. I found there a recital in the form to the effect that the defendant held no preferment within the jurisdiction. Now this statement was not put in the form of inhibition without good reason. But then it might be said that the circumstances of the case required that some punishment other than perpetual inhibition should be substituted for the sentence of deprivation prayed for by the articles in the present case. These circumstances are, that Mr. Mackonochie has resigned the living of St. Alban's, Holborn,

(1) 4 N. of C. 180; 1 Robertson, 322.

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and has been instituted to another living within the diocese of London; and it might be said that some other punishment ought to be substituted, because the prayer in the articles was a prayer for deprivation in respect of the living of St. Alban's, Holborn; and of course Mr. Mackonochie could not be deprived of a living which he did not hold.

Now I have had search made, and I find that in the case of *Noble* v. *Voysey* (1) the sentence of deprivation ordered by the Queen in Council to be issued against Mr. Voysey was a sentence depriving him "of all his ecclesiastical promotion, and especially of the said vicarage or incumbency and parish church of Healaugh, and all profits and benefits of the said vicarage and incumbency, and of any other ecclesiastical promotion of which he may be possessed." (2) And therefore I find that the form of the sentence of deprivation ordinarily in use is a general one, and that the effect of it is that an offender is thereby deprived of all the ecclesiastical promotions possessed by him within the jurisdiction at the time of the sentence, and of course both of any preferment which he may then possess and have held at the institution of the suit, and of any preferment held by him to which he may have been advanced during the pendency of the suit. Therefore I do not think, as at present advised, that there is anything in the new circumstances, that Mr. Mackonochie, having resigned the living of St. Alban's, Holborn, has accepted another living within the province of Canterbury, which prevents or makes it improper for the Court to pass sentence of deprivation against him; but as the point was not discussed when the motion to sentence Mr. Mackonochie was before me on the last occasion, I did not like to pronounce judgment without hearing what the counsel for the promoter had to say on the point.

Dr. Deane, Q.C. In these circumstances the promoter does not now apply that Mr. Mackonochie should be suspended, but asks that he should be deprived in the same terms as in the cases of *Noble* v. *Voysey* (1), and *Coombe* v. *De la Bere* (3), and the

(1) Law Rep. 3 P. C. 357. (2) Law Rep. 3 P. C at p. 408.
(3) 6 P. D. 176.

precedent numbered 48 in Mr. Rothery's collection, of all the ecclesiastical promotions and emoluments he may possess within the province of Canterbury, notwithstanding his resignation and appointment to the fresh preferment of the incumbency of St. Peter's, London Docks.

LORD PENZANCE. I think the actual form of the sentence to be passed on Mr. Mackonochie should be drawn up in the registry with the assistance of the counsel for the promoter. I am inclined to the opinion that the form of the sentence of deprivation which has apparently been in use from the earliest times in the Ecclesiastical Courts, purporting to deprive the offender from all and whatever ecclesiastical promotions and emoluments he possesses in the province of Canterbury, is the sentence which ought to be passed in the case. I must, however, consider the case before I give judgment; but if I am of the same opinion as I am now, I will give the proctor for the promoter notice of the time when he must porrect a regular sentence for me to sign.

Cur. adv. vult.

Before the Court delivered judgment the proctor for the promoter brought into the registry sufficient evidence to satisfy the registrar that Mr. Mackonochie had since the date of the remission, and before the notice of April 12, 1883, voluntarily resigned the incumbency of St. Alban's, Holborn, and had been instituted and inducted and was then incumbent or perpetual curate of the vicarage of St. Peter, London Docks, in the diocese of London.

July 21. The cause came on for judgment and sentence before the Official Principal of the Arches.

Dr. Deane, Q.C., and *Jeune*, appeared for the promoter.

The respondent did not appear either in person or by counsel.

July 21. LORD PENZANCE. This case has been remitted to the Court by the Court of Appeal with directions to the Judge to pass such sentence of censure upon Mr. Mackonochie as in his judgment will meet the necessities of the case. On a former occasion I refused to pass any such sentence, for reasons, however, quite

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independent of the merits of the case. (1) In so refusing the Court of Appeal has decided that I was wrong, and it does not become me to re-open the question. All that I have to determine, therefore, on the present occasion is, not whether any sentence of ecclesiastical censure shall be passed upon the defendant, but what that sentence ought to be. I must here state that since the case was before the Court of Appeal the defendant's position has been altered—he has resigned the living of St. Alban's and has been instituted to the living of St. Peter's, London Docks. How far this change of position affects the sentence of the Court will be one of the questions which I will presently consider. There are but two ecclesiastical censures, so far as I am aware, applicable to the nature of the present case—suspension and deprivation. With regard to the first, although I find that their Lordships in the Court of Appeal referred to "suspension" as a possible sentence, I must say that so long as the matter is left in any degree in my discretion I should not think it fitting to pass a second sentence of suspension upon Mr. Mackonochie, the previous suspension ordered by this Court having never been obeyed—even if it were practicable now that Mr. Mackonochie has ceased to hold the living which he held when this suit was commenced. Nothing, then, remains but "deprivation," and the first question is whether a decree of deprivation has become impracticable by the course which the defendant has adopted of resigning the benefice which he held when the suit commenced. I think it has not. If the precedents in these cases of deprivation are consulted it will be found that it is by no means a sentence addressed to the particular living or preferment held by the incumbent at the time of the citation or the articles. Nor does it operate merely as a withdrawal from the offender of the office or benefice in the discharge of the duties of which the defendant may have misconducted himself. This is obviously so when deprivation is awarded as a sentence of censure for offences which have no relation to the offender's office, as in the case of crime, such as theft or forgery. And yet there are not two sorts of deprivation—two forms of sentence known to the ecclesiastical law, one applicable to cases of misconduct in an office, and another

(1) See *Martin* v. *Mackonochie*, 6 P. D. 87.

to cases of immorality or crime. On the contrary, the ordinary sentence of deprivation, as appears from the form in which it has been passed in modern times, which is also the same form that was in use in old times, is a general one, depriving the offender of "all his ecclesiastical promotions" within the jurisdiction of the Court. Thus, in the case cited by the learned counsel from Mr. Rothery's collection of the decrees of the Court of Delegates (No. 48, *Woodward* v. *Atwood and Others*," on appeal), the suit was against William Woodward, rector of Trottescliffe, in Kent, and the articles charged him with various offences. The sentence was:—"Dictum igitur William Woodward ab omnibus officiis et beneficiis ecclesiasticis quibuscunque et cujuscunque naturæ seu conditionis privamus et amovemus." In this case it is to be noted that no mention whatever is made of the particular benefice which the case shews that the offender held, though in others which I am about to refer to it is otherwise. The form in which the sentence of deprivation was lately pronounced by Her Majesty in Council in Mr. Voysey's case was as follows:—"He ought by law to be deprived of all his ecclesiastical promotions, and especially of the said vicarage or incumbency and parish church of Healaugh . . . . and of any other ecclesiastical promotions whereof he may be possessed." This form of sentence was followed in the case of *Coombe* v. *De la Bere*. (1) The words were:—"Pronounce, decree, and declare that the said Rev. J. B. De la Bere, by reason of the premises, &c. ought by law to be deprived of all his ecclesiastical promotions within the province of Canterbury, and especially of the said vicarage of Prestbury, and of any other ecclesiastical promotions within the province of Canterbury whereof he may be possessed." (2) A similar form of sentence was passed in the case of *Burgoyne* v. *Free*. (3) In that case the material words were:—"By reason of the premises ought by law to be and is deprived of his ecclesiastical promotions, and especially of the rectory and parish church of Sutton." And in the case of *The Bishop of Norwich* v. *Pearce* (4), A.D. 1868, the decree was that the Rev.

(1) 6 P. D. 157.

(2) See *Coombe* v. *De la Bere*, 6 P. D. 157.

(3) 2 Hagg. 494.

(4) Law Rep. 2 A. & E. 281.

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R. W. Pearce "ought by law to be deprived of his ecclesiastical promotions, and especially of the rectory of Gaywood, &c., and I do deprive him accordingly." And, lastly, it is the form of deprivation given in the only published book of forms in use in the Ecclesiastical Court—I refer to Mr. Coote's "Book of Forms," p. 244. I do not doubt but that it would be competent to the Court to limit the sentence of deprivation to the particular preferment or benefice stated in the articles to be held by the offender in any case in which justice required that it should be so limited. But from the above precedents it is plain, I think, that the ordinary sentence of deprivation is a general one, extending to all the ecclesiastical promotions or preferments held by the offender at the time that the sentence is pronounced. I say at the time the sentence is pronounced, for the traditional sentence runs thus—not promotions, &c., "held by him at the commencement of the suit," but simply "all his ecclesiastical promotions." And then, after referring particularly to the living or promotion named in the articles, the sentence goes on with these words:—"and any other ecclesiastical promotions of which he is possessed." It is impossible, I think, to read these words, "is possessed," as referring to possession at any other time than at the time at which the sentence is pronounced. I have been thus particular in scrutinizing the language of this established and traditional form of sentence on account of the peculiar circumstances of Mr. Mackonochie's case. He has resigned the living which he held at the commencement of this suit, and it is no longer reasonable or fitting that the words which in some of the above cases follow the general sentence of deprivation, viz., "and especially of his said vicarage or incumbency of ———," should be inserted in the sentence. But that does not appear to me to affect the propriety of passing the general sentence of deprivation which precedes the introduction of these words, and is independent of them. There is evidence before the Court that Mr. Mackonochie is possessed of at least one other promotion or preferment, although he has resigned that of St. Alban's, and is still, therefore, a beneficed clergyman. Whether he has or has not any other ecclesiastical promotion the Court has no means of knowing, but I required that some evidence should be laid before

the Court upon this subject, for the sentence proper to be passed depended upon whether he was a beneficed clergyman or not. If he had held no benefice or preferment, a sentence of deprivation would have been idle, and the proper sentence would have been one of perpetual inhibition from performance of spiritual ministrations within the province, such as was passed in the case of *Hudson* v. *Oakley*. (1) It was, indeed, suggested by the learned counsel at first, that such a sentence might properly be passed upon Mr. Mackonochie, but further consideration satisfied the promoter of the suit that such a sentence could not properly be passed upon a beneficed clergyman, and in the result the sentence which he prayed at the hands of the Court is that which he prayed in the articles—viz., "That Mr. Mackonochie may be deprived of all his ecclesiastical promotions within the province of Canterbury," omitting the subsequent words which refer particularly to the living of St. Alban's. In my opinion there is no objection in point of law either of form or substance to such a sentence, and I cannot say that Mr. Mackonochie's numerous offences of incorrigible disobedience have not rendered it one that the promoter is entitled to ask for as far as the merits of the case are concerned. Is there then any other reason why the Court should refrain from pronouncing it? I am wholly unaware of the circumstances which led to Mr. Mackonochie's resignation. I speak, of course, of official knowledge. From common rumour and report, indeed, I am led to believe that his resignation was, at any rate in some degree, brought about by the intervention of the late Archbishop of Canterbury, but upon what conditions or understanding, if any, I have never heard, and were I personally cognizant of them such matters could have no place in this judgment, and no bearing or influence upon my present duty, inasmuch as they have never been disclosed or made known to the Court. If anything has occurred in connection with this gentleman's resignation which makes it unfitting or unfair that the promoter of the suit should now demand at the hands of the Court that sentence of censure which the Court of Appeal has directed me to pass, the duty devolved upon Mr. Mackonochie himself of bringing such matters to the notice

(1) 1 Rob. 322.

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of the Court, and as he has not done so I can only deal with the case upon the footing that no such circumstances exist. A very few words upon the merits of the present case will suffice on the present occasion. I need not travel over the ground again which I traversed in the late case of *Coombe* v. *De la Bere* (1), to which I beg leave to refer. I there examined the older authorities, both ecclesiastical and those belonging to the common law, from which it was abundantly plain that incorrigible disobedience to the ordinary or to the canons of the Church, and contumacious disregard of the decrees of the Ecclesiastical Courts, were fitting grounds for "deprivation," as was also the disregard of the directions of the Prayer Book in the performance of Divine service, and I pointed out how and in what manner Mr. De la Bere had shewn himself to be guilty of this disobedience. Almost word for word what I then said is applicable to Mr. Mackonochie's conduct as set forth in the articles in this suit, and it is needless, therefore, to repeat it. My duty will be adequately discharged on the present occasion, I think, if I pronounce that the articles, save and except the 12th, 22nd, and 23rd articles, having been fully proved to my satisfaction, that Mr. Mackonochie has offended against the laws of the Church in the respects therein charged against him, and that I am ready to pronounce and sign the formal sentence of deprivation which I understand that the promoter has prepared and is ready to tender to me for that purpose. I condemn Mr. Mackonochie in the costs of the suit.

Proctors for promoter: *Moore & Currey.*

(1) 6 P. D. 157.

E. S. R.

[IN THE COURT OF APPEAL.]

1883
May 9.

BURGOINE *v.* MOORDAFF.

Practice—Right to Trial by Jury—Probate Act, 1857 (20 & 21 *Vict. c.* 77), *s.* 35—*General Orders XXXVI., rr.* 3, 26.

In an action by an executor to establish a will, the heir-at-law was cited. The plaintiff gave notice of trial by jury. The action was twice tried by a special jury, before Sir J. Hannen, and in each case the jury disagreed and were discharged. The plaintiff having set the action down for trial again before a special jury, the defendants applied for special directions as to the further trial. Sir J. Hannen, the heir-at-law appearing and not opposing, made an order that the action should be tried by a judge without a jury. The plaintiff appealed:—

Held, that the case was one where, under 20 & 21 Vict. c. 77, s. 35, as the heir-at-law did not ask for a jury, the judge could, before the Judicature Act, without any consent, have ordered the action to be tried without a jury: that a choice of the mode of trial under Order XXXVI., rule 3, did not exclude the application of rule 26, and that the judge therefore had jurisdiction to make the order appealed from:

Held, further, that though the order was subject to appeal, the Court of Appeal would not interfere with the discretion of the judge except in a strong case, and that here there was no ground for holding that his discretion had been wrongly exercised.

THIS was an action by an executor to establish the will of Sarah Moordaff, and the heir-at-law was cited. The defences set up were, that the will was not duly executed, that the testatrix was not of sound mind, and that the will was obtained by undue influence. The plaintiff gave notice of trial by a jury, and the defendants did not apply for trial in any other way. The action was tried in February, 1882, before Sir J. Hannen and a special jury. The jury could not agree and were discharged. The action was again set down for trial by a special jury, and was tried before Sir J. Hannen in June, 1882. The jury again disagreed and were discharged. On the 6th of November, the plaintiff again set down the action for trial before a special jury. The defendants after this took out a summons for special directions as to the further trial of the action, and on the 3rd of April, 1883, Sir J. Hannen ordered that it should be heard by a judge without a jury, counsel appearing for the heir-at-law

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and not opposing. The President said that he should not have made this order if it would have involved his trying the action himself, since he had formed his opinion on the case; but that as it would be heard before a fresh judge he thought this the best course.

The plaintiff appealed from this order.

Willis, Q.C., and *Bayford*, for the appellant. No doubt the President could before the Judicature Act have directed a trial without a jury; but rule 26 of Order XXXVI., must be taken in connection with rule 3. Under that rule, a party who has given notice of trial by jury is entitled to have his case so tried. The probability that a jury will disagree ought not to be taken into consideration: *Clarke* v. *Skipper*. (1) The case is not within the spirit of rule 26, even if within its letter: *Bordier* v. *Burrell*. (2) There is nothing in the rules which after a trial by jury has been directed authorizes a change in the mode of trial. The 26th rule can only be treated as applying to cases where the mode of trial has not been otherwise fixed, as in a case under rule 5. The case is not one which could be tried without a jury before the Judicature Act, the consent of the heir being requisite.

Inderwick, Q.C., and *C. A. Middleton*, for the respondents. Rule 3 is expressly made "subject to the provisions of the following rules," and there is nothing in the terms of rule 26 to limit it to cases where an election to try by jury has not been made under rule 3.

[They were then stopped by the Court.]

R. Searle, for the heir-at-law.

Willis, Q.C., in reply, referred to *Sugg* v. *Silber*. (3)

BAGGALLAY, L.J. This is an appeal from an order of the President of the Probate Division, directing the action to be tried before a judge without a jury under Order XXXVI., rule 26. The first objection taken to this order was that the case is not within the rule, and that there was no jurisdiction to make the

(1) 21 Ch. D. 134. (2) 5 Ch. D. 512.

(3) 1 Q. B. D. 362.

order, because the rule gives power to direct a trial without a jury only where the issue is one which could before the Judicature Act, without any consent of parties, be tried without a jury. The argument in support of this proposition proceeds on the footing that the case could not except by consent have been tried without a jury before the passing of the Judicature Act. There was a difference in the views of the appellant's counsel on this point; but in my opinion Mr. Bayford was right in his admission that the case could have been so tried without consent. By the Probate Act of 1857 (20 & 21 Vict. c. 77), s. 35, it is enacted that the Court of Probate may cause any question of fact to be tried by a jury before the Court itself or by means of an issue to be directed to one of the Courts of Common Law, and that such question shall be so tried by a jury if the heir-at-law cited or made a party to the suit or proceeding applies to the Court of Probate for that purpose, and that in any other case where all the parties to the suit or proceeding concur in such an application, and where any party or parties other than such heir-at-law make a like application, the other party or parties not concurring therein, if the Court refuses to order a trial by jury the refusal shall be subject to appeal as therein provided. Here, then, if the heir-at-law had applied for a trial by jury the action must have been tried in that way, but no such application was made by him, and the section plainly imports that if he does not so apply the judge may have the case tried without a jury, notwithstanding the opposition of some of the parties.

It was then urged that, assuming there was jurisdiction under Order XXXVI., rule 26, the discretion given by that rule could not be exercised after a notice had been given by the plaintiff under rule 3. That rule provides that "subject to the provisions of the following rules," the plaintiff may, on giving notice of trial, specify one of the modes of trial mentioned in rule 2, and the defendant may, upon giving notice within four days from the service of the notice of trial, or within such extended time as may be allowed, that he desires to have the issues tried before a judge and jury, be entitled to have the same so tried. The plaintiff, in accordance with that rule, gave notice that he wished the case to

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be tried by a jury. The defendants gave no counter-notice, and the plaintiff's notice was acted upon by two successive trials—at neither of which could the jury agree. I see no reason for limiting the 26th rule in the way contended for by the appellant, there being nothing in its terms to impose such a limitation, while on the other hand rule 3 is expressed to be subject to the following rules. It appears to me, therefore, to be clear that the effect of a notice by the plaintiff under the 3rd rule may be interfered with under the 26th rule. If the judge has jurisdiction his exercise of it is a matter of discretion. Some expressions of James, L.J., in *Ruston* v. *Tobin* (1) gave rise to a notion that the exercise of such a discretion could not be interfered with by the Court of Appeal; but the principle on which the Court proceeds was accurately laid down in *In re Martin* (2), that an appeal lies, but that there must be a plain and clear case to justify the Court of Appeal in interfering. That is the true rule—the Court of Appeal will not interfere unless it is clear that the discretion has been wrongly exercised. Is that the case here? I think not. The judge had better means than we of knowing whether the case is one which it is desirable to have tried before a jury again, and he thought it was not. So far as I can judge I think he exercised his discretion wisely, but had I doubted the soundness of his conclusion I should not have thought it right to interfere with it, unless I had been clear that he had gone wrong.

LINDLEY, L.J. Under the 35th section of the Probate Act, 1857, this cause could, before the Judicature Act, have been tried without a jury without any consent of the parties. The only question then is whether the judge could under Order XXXVI., rule 26, direct it to be so tried after the parties had chosen a trial by jury under rule 3. I see nothing in the words of the 26th rule to limit it in the way proposed, and I think the power conferred by it a beneficial power, which ought not to be limited to any particular stage of the proceedings when there is nothing in its terms to impose such limitation. The judge at this late stage of the proceedings has a better opportunity than before of

(1) 10 Ch. D. 558. (2) 20 Ch. D. 365.

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determining whether the case can be usefully tried before a jury. This is eminently a case for the exercise of the discretion of the judge. Having heard the case tried twice by a jury he has come to the conclusion that there is little chance of a jury agreeing, and that the trial had better be before a judge without a jury. With this exercise of his discretion I think we ought not to interfere.

Appeal dismissed.

Solicitors for plaintiff: *Wood & Wootton.*
Solicitors for defendants: *Bell, Brodrick, & Gray.*
Solicitors for heir-at-law: *Speechly & Co.*

H. C. J.

THE LIVIETTA.

Aug. 6.

Priority of Claims—Foreign Consul—Payments of Viaticum—Solicitor—23 & 24 Vict. c. 127, *s.* 28.

Salvage actions were brought against an Italian vessel, and she was sold by order of the Court. After the salvors had been remunerated, the balance of the fund in Court was insufficient to satisfy the costs of the solicitors who had appeared in the above actions for the parties interested in the ship, and who sought to enforce their claim for such costs by virtue of 23 & 24 Vict. c. 127, s. 28, as well as the claim of the Italian consul in respect of the expenses of sending the crew back to Italy. It was proved that by the law of Italy such expenses and the keep of the master and crew ranked next to the salvage payments:—

Held, that the claim of the Italian consul had priority to that of the solicitors.

SUMMONS adjourned into Court. Application was made by Messrs. Cooper & Co., solicitors, that the sum of 60*l.* 10*s.* 3*d.*, the balance of a fund in Court, should be paid out to them in part satisfaction of their taxed costs, which amounted to 92*l.* 7*s.* 11*d.* The application was opposed on behalf of the Italian consul general, resident in England, who desired that the fund in Court should be paid out to him as the representative of the Italian government.

It appeared that two actions of salvage had been brought against the *Livietta*, an Italian vessel, which had become a derelict in the North Sea, for services rendered to her by the

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steamship *Walton* and the brig *Julie*. The *Livietta* had been abandoned by her owners to the underwriters, and the agents of the latter instructed Messrs. Cooper & Co. to appear for them. The *Livietta* was arrested as soon as she was towed into Dover at the suit of the salvors. In the result the *Livietta* was sold by order of the Court, and the salvage rewards having been paid out of the proceeds to the salvors, the above balance remained in Court.

Messrs. Cooper & Co. alleged that they had paid the marshal upwards of 10*l.* for possession fees, and had made various arrangements in regard to the litigation by which expense had been saved, and that they had paid moneys for pumping the *Livietta* and stowing her sails. They further alleged that the above balance would but for their services have been swallowed up in costs.

The *Livietta* was arrested in the first action on the 16th of November, 1882, and in the second on the 23rd November, released on Messrs. Cooper's undertaking on the 28th of December; re-arrested on the 22nd of January, 1883, and sold on the 20th of February, 1883.

It was alleged in the affidavit of the Italian consul general that the crew of the *Livietta* were sent back to Italy through the agency of the Italian consuls general at Antwerp, Paris, and Marseilles, and that the expenses incurred by them amounted to 62*l.* 7*s.* 4*d.*; these particulars of the expenses were certified by a notary public. By paragraph 5 of the affidavit it was stated that he, the consul, was fully conversant with the Italian laws, and that the moneys disbursed as above stated were by the Code of the Italian Mercantile Marine, articles 56 and 133 (1), privileged

(1) Art. 56. "The owners and charterers are also responsible jointly for payment of the taxes and other maritime, dues for premiums and wages, and for retentions of wages due to the Cassa degli Invalidi of the Mercantile Marine for the expenses of board and return to their country of the men composing the crew and for every outlay made on their behalf by government agents if such expenses are to be chargeable against the ship. The liability to refund the expenses of board and return to their country of the men forming the crew ceases in case of shipwreck and of abandonment of the vessel, but repayment of the same shall be effected out of the salvage or the value thereof, with privilege according to the terms of Article 133.

"For reimbursement of the expenses

for payment out of the proceeds of the salved ship next to the salvage award and salvage expenses. A translation of the above articles was certified by a notary public.

July 30. *Phillimore*, for Messrs. Cooper & Co., argued that the property in Court had been saved by the solicitors' exertions, that except for the services of the solicitors there would have been no fund against which the consul could claim, and that the consul was entitled to no kind of lien in respect of his payments, and that by 23 & 24 Vict. c. 127, s. 28, a lien was under the circumstances given to the solicitors, and that part of the sum claimed was in respect of actual payments for the ship.

Aspinall, for the Italian consul, argued that nothing had been done within the meaning of the Act to save the property; that by the Italian law there was a lien for the sums which the Italian consul claimed against the ship; and that it was the practice of the Courts to enforce such foreign liens.

Phillimore, in reply.

[In addition to the cases mentioned in the judgment the following were also referred to in the arguments of counsel: *Pinkerton* v. *Easton* (1); *Foxon* v. *Gascoigne* (2); *The Gaetano and Maria*. (3)]

Cur. adv. vult.

Aug. 6. SIR JAMES HANNEN. [After stating most of the above

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referred to in this Article harbour masters may issue injunctions which shall be rendered executory by decree of the President of the Civil Tribunal, saving appeal to the said tribunal within the term of twelve days, and on payment of the amount for which the appellant must produce receipt attached to his appeal without which it will be inadmissible.

Art. 133. "Out of the proceeds of the sale of the ship and cargo will be privileged in the following order: 1st. The expense of sale; 2nd. The expenses of salvage and safe keeping of the effects wrecked, including the remuneration of the persons who effected the salvage and the expenses of conveyance of the harbour employés.

"Out of the residue of the ship and out of the freight will be privileged the keep of the captain and crew, indemnities for their return to their country and the wages of the said crew, and afterwards privileged debts in accordance with the commercial laws."

(1) Law Rep. 16 Eq. 490.

(2) Law Rep. 9 Ch. 654.

(3) 7 P. D. 137.

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facts, the learned judge proceeded as follows :—] Messrs. Cooper & Co. assert that the balance in Court has been preserved through their instrumentality, and claim to be entitled under 23 & 24 Vict. c. 127, s. 28, to a charge on this fund as to their costs, charges, and expenses in the above actions, amounting to 92*l.* 7*s.* 11*d.*

I do not consider that the whole sum remaining in court has been preserved by Messrs. Cooper & Co.'s services; but they have by payments which they have made and by giving bail, saved the fund in court from some charges which would otherwise have fallen upon it. The Italian government, through its consul, prefers a claim to be paid out of the proceeds of the ship which remain in court the expenses which it has been put to in sending back to Italy the crew of the *Livietta*. Proof has been given that by the law of Italy the Italian government is entitled in case of shipwreck and abandonment of the vessel by the owners to be repaid out of the salvage the expenses of sending the crew home, (1.) "After payment of the expenses of sale; (2.) of the expenses of salvage and safe keeping of the effects wrecked, including the remuneration of the persons who effected the salvage, and the expenses of conveyance of the harbour employés."

The question is whether the claim of the Italian government is to be preferred to that of Messrs. Cooper & Co. The Italian law on this subject is very similar to our own. By the 205th section of the Merchant Shipping Act, 1854, the expense of sending seamen belonging to a British vessel home from a place abroad where their services have terminated, is to be paid by the master, and if not paid by him, may be defrayed by the consular officer, and shall in that case be a charge upon the ship and may be recovered against the owners with costs, and if allowed to the consular officer out of the public moneys may be recovered as a debt due to Her Majesty, either by ordinary process of law or in the manner in which seamen are enabled to recover wages. The same measure which we should expect to be meted in similar circumstances by the Italian tribunals to our government ought to be applied in this case to the Italian government. The object of the 28th section of 23 & 24 Vict. c. 127, is to prevent the client, who has had the benefit of his solicitor's services, from

carrying off the spoils of victory without applying them towards the remuneration of those services. It was not, I conceive, intended to give the solicitor priority over claims giving a lien which could have been enforced in the suit by other persons against the property which was the subject of litigation. A mortgage created by the client for the benefit of a person having no notice of the litigation would not be superseded by a charging order subsequently obtained by the solicitor, and a charge created by the law must, I think, be put on an equal footing with one arising out of the contract of the client. Such charges in effect diminish the property or the value of the property which could be recovered or preserved by the solicitor's instrumentality. In the present case the *Livietta*, when she came within British jurisdiction, was already by the law of her flag subject, in the events which had happened, to a charge in favour of the Italian government for the expenses of conveying her crew back to Italy. I think that this charge should, on general principles as well as by analogy with our own statute, rank as high as wages. When the law imposes on the ship in the event of shipwreck a charge for the expense of the reconveyance of the seamen to their own country, this must be looked on as a part of the terms upon which the seamen engage for the voyage, and is another form of remuneration for the services the sailors render up to the time of the wreck. In *The Gustaf* (1) Dr. Lushington held that the claim of the seamen for their wages earned before a ship came into the shipwright's hands, took precedence of the shipwright's common law lien for repairs, and in the case of foreigners that they were entitled in addition to their wages to priority for what the learned judge terms the "ordinary allowance for return to their own country." In support of the solicitors' charge reliance was placed on *The Soblomsten* (2), where Dr. Lushington ordered the fund in court to be applied, first, in satisfaction of the proctor's costs, and secondly, of a shipbroker's claim for necessaries supplied after the arrest of the ship. But, as the learned judge had pointed out in *The Gustaf* (1) and other cases, "the supplying of necessaries does not give ab origine a lien, but only

(1) 31 L. J. (Ad.) 207; Lush. 506. (2) Law Rep. 1 A. & E. 293.

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a statutory remedy against the res, which is essentially different." The same remark applies to *The Heinrich* (1), where the claim of a solicitor was preferred to one for necessaries, with the additional circumstance that the necessaries were there supplied after the institution of the original suit. Priority was also given in that case to the solicitor's claim over that of the master for wages, but it appeared that the latter was a part owner and had himself instructed the solicitor to defend the suit, and on this ground it was held that he could not enforce his claim to wages to the prejudice of the solicitor. In *The Jeff Davis* (2) priority was given to the claim of the solicitor over that of the holder of a garnishee order, that is, the claim of the solicitor was preferred to a debt of the client wholly unconnected with the ship. This does not seem to shew that Sir Robert Phillimore would have preferred the claim of the solicitor to that of the seamen for their wages, to which the present claim must, I think, be likened. For these reasons I think that the Italian government is entitled to an order for payment out of the sum in court of the expenses of sending the crew of the *Livietta* back to Italy.

Solicitors: *T. Cooper & Co.*

Solicitors for the Italian Consul General: *Deacon, Son, & Gibson.*

(1) Law Rep. 3 A. & E. 505. (2) Law Rep. 2 A. & E. 1.

E. S. R.

IN THE GOODS OF WILLIAM BRADLEY, DECEASED.

1883
July 30.

Will—Executor according to the Tenor.

A testator by his will said, "I appoint R. H. P. and J. E. W.," but did not state in what capacity he appointed them. He also bequeathed legacies to "each of my executors," and gave to his "said executors" the residue of his property, with certain directions as to it. The Court *held*, upon motion, that by the words of the will R. H. P. and J. E. W. were appointed executors, and granted probate to them accordingly.

WILLIAM BRADLEY, late of No. 10 and 11, Ely Place, Holborn, in the county of Middlesex, solicitor, deceased, died on the 21st of March, 1883, having made his will, dated the 28th of August, 1882.

The material parts of the will, which was holograph, are as follows:

"This is the last will and testament of me, William Bradley . . . . . I appoint Robert Hanson Brooks, of 17 Moorgate Street, in the city of London, gentleman, and James Edward Walker, of 2 Chancery Lane, in the county of Middlesex. I bequeath my books, pictures, statuettes, and other ornaments of a like nature to . . . . . I give to each of my executors the sum of 20*l.* I give and bequeath unto my said executors and trustees all the rest, residue, and remainder of my property . . . . . And I direct them to pay the income of the investments to my dear mother for her life . . . . . and after her death to divide the fund equally between my said sister and the said Anne Walker . . . . . "

An affidavit by Mr. Walker had been filed, stating (amongst other things) that in the month of August, 1882, the deceased asked him whether he would consent to act as his executor with Mr. Brooks, and that before the deceased left England in that month he told him that he had made his will and appointed him and Mr. Brooks his executors.

July 16. *A. Powell* moved for probate of the will to Mr. Walker and Mr. Brooks as executors. The context sufficiently shews that

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they are the executors, and if not the Court can supply the missing words: *Doe* d. *Leach* v. *Micklem* (1); *Cropton* v. *Davies* (2); *In re Bird's Trusts* (3); *In re Daniel's Settlement Trusts* (4); *Greenwood* v. *Greenwood* (5); *Redfern* v. *Bryning* (6); Jarman on Wills, 4th ed., p. 486. The Court can also admit parol evidence as to the persons whom the deceased intended to name as executors: *Upfill* v. *Marshall* (7), *Baylis* v. *Attorney General* (8), *Hunt* v. *Hort* (9), and the cases cited in *Fawcett* v. *Jones.* (10) *Fawcett* v. *Jones* (10) is itself distinguishable from this case. If parol evidence is admissible it is clear that the deceased intended to name the applicants executors.

Cur. adv. vult.

July 30. SIR J. HANNEN (President). In this case the question is whether or no these persons can be treated as executors, and as the application is made with the consent of all those who are interested in the estate, I have less hesitation in expressing my opinion. The testator's intention to appoint executors is clear, and he must have supposed he had done so since he gives to each of them a sum of money, and bequeaths the residue to them as executors. The words of the will shew that he meant to appoint Robert Hanson Brook and Samuel Edward Walker to something, and the inference I draw is that he intended to appoint them as executors. I therefore grant probate to them as such.

Solicitor: *E. Walker.*

(1) 6 East, 486.
(2) Law Rep. 4 C. P. 163.
(3) 3 Ch. D. 214.
(4) 1 Ch. D. 375.
(5) 5 Ch. D. 954.
(6) 6 Ch. D. 133.
(7) 2 Notes of Cases, 400.
(8) 2 Atk. 239.
(9) 3 Bro. C. C. 311.
(10) 3 Phill. 434.

R. A. P.

BELL *v.* BELL.

1883
July 17.

Divorce—Parties—Alleged Adulteress.

In a suit by a wife for dissolution of marriage, the Court, upon application on behalf of the person with whom it was alleged that the husband had committed adultery, directed that she be made a respondent.

THIS was a wife's petition for dissolution of marriage by reason of the husband's cruelty and adultery with Mary Dryden Russell.

The respondent did not appear.

The Court having ordered a witness for the petitioner to be examined by commission, Mrs. Russell made an affidavit denying the adultery.

Dunlop Hill, for Mrs. Russell, asked that she might be made a respondent, in order that counsel on her behalf might attend the examination and cross-examine the witness: 20 & 21 Vict. c. 85, s. 28. (1)

SIR J. HANNEN (President). This is an unusual application, but if Mrs. Russell desires it I think she is entitled to an order directing that she should be at liberty to intervene in the suit.

Motion granted.

Solicitors for applicant: *Hopwood & Sons.*
Solicitors for petitioner: *Clarke, Rawlins, & Co.*

(1) The following are the material parts of the section. "Upon any such petition . . . . the Court, if it see fit, may direct that the person with whom the husband is alleged to have committed adultery be made a respondent . . . ."

R. A. P.

1883
May 2.

[IN THE COURT OF APPEAL.]

THE HECTOR.

Damage—Collision—Appeal—Costs—Compulsory Pilotage—Measure of Damages.

Where a collision has occurred between two vessels, through the bad navigation of each of them, the owners of the ships are not entitled to the costs of any litigation arising out of the collision.

Where a collision has occurred between two vessels through the bad navigation of each of them, and where one of the vessels, by compulsion of law, has had on board a pilot whose default has contributed to the accident, the owner of that vessel is entitled to recover a moiety of the damage sustained by her without any deduction on account of the damage sustained by the other.

On the 1st of September, 1881, a collision occurred between Dover and the South Foreland between the screw steamer *Augustus*, on a voyage from New York to Newcastle-on-Tyne, and the screw steamer *Hector*, on a voyage from London to Yokohama in charge of a duly licensed pilot. Cross-actions were brought by the owners of the steamers to recover for the damage sustained by their respective vessels in the collision. The owners of the *Hector* claimed 8000*l.* damages, the owners of the *Augustus* 3000*l.* These actions were consolidated, and the owners of the *Augustus* remained the plaintiffs, the owners of the *Hector* being defendants. On the hearing of the action before the judge of the Admiralty Division he found the *Hector* solely to blame for bad navigation, and for not having a proper look-out, and held on the authority of *The Iona* (1) and *Clyde Navigation Co.* v. *Barclay* (2), that the latter act of neglect rendered the owners of the *Hector* liable, notwithstanding a pilot was on board of her by compulsion of law. From this decision the owners of the *Hector* appealed. The Court of Appeal, after hearing the arguments on behalf of the owners of both steamers, pronounced in favour of the appeal, and reversed the decision of the judge of the Admiralty Division so far as it found the collision to be owing to the fault of the master and the crew of the *Hector*, and pronounced the collision to have been occasioned by the default of those on board the *Augustus*,

(1) Law Rep. 1 P. C. 426. (2) 1 App. Cas. 790.

and of the pilot in charge of the *Hector*, whose employment the Court held to have been compulsory.

The Court also pronounced against the claim for damages of the owners of the *Augustus* and dismissed the bail given on behalf of the owners of the *Hector* in respect of such damages, and pronounced that a moiety of the damages sustained by the owners of the *Hector* should be borne by the owners of the *Augustus*, and condemned them and their bail in a moiety of such damages, to be assessed by the registrar of the Admiralty Division, assisted by merchants.

March 10. *Myburgh, Q.C.*, for the owners of the *Hector*, applied for a direction as to the costs.

W. G. F. Phillimore, for the owners of the *Augustus*.

During the argument *The Swansea* v. *The Condor* (1) and *The Milanese* (2) were referred to.

BRETT, L.J. The Court of Appeal may have to deal with various questions of costs that may arise. The Admiralty Division may find both vessels to blame, and on appeal that judgment may be affirmed. Under such circumstances the appeal, obviously and clearly, has been wrongly brought. In the present case, the Admiralty Division has found one of the two vessels to blame, whereupon the owners of that vessel have appealed. Without differing from the Admiralty Division as to any point of law, this Court has found that both vessels were to blame, and therefore that the judgment of the Admiralty Division ought to have been that both vessels were to blame. The appellants were, so to speak, forced to bring the appeal, because if they had sat contented with the judgment, they would have been made liable to pay all the damage done to the other vessel and also to pay all the costs of the action. They were bound to appeal, and they have appealed. Two modes of appeal were open to them. They might appeal on the sole ground that the judgment ought to have been that both vessels were to blame; but although they might succeed, the Court might not be prepared to say that they

(1) 4 P. D. 115. (2) 43 L. T. (N.S.) 107.

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would give costs. The other ground of appeal would be that the judgment of the Admiralty Division ought to have been entirely in their favour. In that case they would fail to support the ground of their appeal in its entirety, but nevertheless they would in part succeed, for the judgment is altered. But then arises the point that by claiming more than they have got, they have done no harm to the other party, because it was absurd to suppose that if they had claimed in the Admiralty Division merely a judgment that both vessels were to blame, the Court below would have acceded to the claim. That, therefore, could not be the ground, upon which the rule as to costs in the Admiralty Division is alleged to have been established. My own view of the case is, that the Admiralty Court, which had always exercised a very wide jurisdiction with regard to the discipline of the seas, laid down this rule: if both vessels are to blame, neither of them shall gain by any litigation in the matter. The Privy Council, I think, adopted that view of the matter, and carried out the rule on appeal, save under exceptional circumstances. Those exceptional circumstances are where the judgment of the Court below has been that both vessels were to blame, and that judgment is affirmed. It has been supposed that James, L.J., in *The Swansea* v. *The Conder* (1), derogated from that rule, but I do not think that he did. I think that the Lord Justice must have been alluding to cases resembling that before him. At all events, he and the other members of the Court of Appeal in *The Milanese* (2) reverted to the old rule. The better way to solve the matter is, I think, to say that in order to enforce care at sea, where it is so important that care should be observed, the Court of Appeal will adopt the rule of the Court of Admiralty and the rule of the Privy Council to this extent, that unless in some exceptional case, such as I have mentioned, they will not, where both sides have been to blame, allow either ship to gain anything by the litigation. Therefore the costs of the appeal will not be given any more than the costs of the action.

BOWEN, L.J. I think that the rule enunciated by Brett, L.J., is based upon common sense. When two ships are equally in

(1) 4 P. D. 115.

(2) 43 L. T. (N.S.) 107.

fault, it is a matter of discipline that neither ship shall benefit by the litigation. If the appeal is brought to set the Court right where the Court was wrong, then the costs of the appeal ought to follow the general rule that the litigation ought to be borne equally by both sides, the appeal being a necessary and natural step in the litigation. But if the appeal was brought to set the Court wrong when the Court below was really right, why, of course, the person who was unwise enough to try to set the Court wrong by an appeal ought to bear the costs. In this case the appeal was brought to set the Court right, and although the appellant only set the Court right to a certain extent, the case did not fall under the class of cases where the sole object of the appeal was to set the Court wrong.

COTTON, L.J. I agree with the rule; but I do not know that if the question was to be settled by reason or on sound principles, I should have so laid it down. Whoever appeals, ought, I think, to get the costs of a successful appeal, and to pay the costs of an unsuccessful appeal.

Order that each party shall bear their own costs both in the Admiralty Division and in the Court of Appeal.

The owners of the *Augustus* afterwards moved in the Court of Appeal, that the judgment might be varied by ordering that the *Hector* should recover a moiety of the damage sustained by her less a moiety of the damage sustained by the *Augustus*.

May 2. *Webster, Q.C.*, and *W. G. F. Phillimore*, for the owners of the *Augustus*. This is a question of some importance as to the amount of damages to be paid by the owners of the *Augustus:* if each party prove the total amount claimed by them, the owners of the *Hector* will be entitled to recover 4000*l.* damages from the owners of the *Augustus:* for the *Hector* is alleged to have been damaged to the extent of 8000*l.*, and the judgment of the Court of Appeal is that a moiety of the damages sustained by the owners of the *Hector* shall be borne by the owners of the *Augustus;* whereas the owners of the *Augustus* contend that *The Stoomvaart*

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Maatschappy Nederland v. *Peninsular and Oriental Steam Navigation Co.* (1) (the case of *The Khedive*) is directly in point, and that the owners of the *Hector* are entitled to recover only 4000*l.*, being a moiety of the damage sustained by them (8000*l.*), less 1500*l.*, being a moiety of the damage sustained by the *Augustus* (3000*l.*), and that the total amount to be recovered by the owners of the *Augustus* is only 2500*l.* instead of 4000*l.* In the case of *The Khedive* (1), the decision of the House of Lords turned upon 25 & 26 Vict. c. 63, s. 54, which uses the words "answerable in damages:" the material enactment in the present case is 17 & 18 Vict. c. 104, s. 388, which exempts owners from liability for injuries done by their vessels when a pilot is on board by compulsion of law: the words used are "answerable to any person whatever for any loss or damage," and these are substantially identical with the language of 25 & 26 Vict. c. 63, s. 54, and must receive the same construction. This view is the most favourable to the owners of the *Hector*, which can be by any possibility adopted; but it may be also contended that the owners of the *Augustus* are not liable for any amount: both ships were guilty of bad and unskilful navigation, but the *Hector* is exempt from liability by reason of compulsory pilotage: these two ships ought to be on equal terms, and neither ought to contribute towards repairing the damage done to the other.

A. Charles, Q.C., for the owners of the *Hector*. The rule laid down in the case of *The Khedive* (1) has no application to the present case. Where a pilot is by compulsion of law on board a vessel which does damage through bad navigation, her owner is not liable to anybody. The judgment in the present case has been drawn up correctly, as is plain from *The Demetrius* (2). Nothing can be subtracted from the amount representing the moiety of the damage, which the *Hector* has sustained, for her master and crew are not to blame for the collision, although her navigation was bad owing to the fault of the pilot who was on board by compulsion of law. It may be that the logical consequence of the argument for the owners of the *Hector* is, that they ought to recover the whole of the amount of the damage sustained by her (8000*l.*) instead of only a moiety; but they admit that

(1) 7 App. Cas. 795. (2) Law Rep. 3 A. & E. 523.

by the practice established in the Court of Admiralty and in the Admiralty Division they are entitled to only a moiety.

Webster, Q.C., in reply.

BRETT, M.R. It seems to me that this case is not governed by the decision of the House of Lords in the case of *The Khedive* (1), because the two enactments mentioned during the argument are different and apply at different periods of the dispute between the parties. As I understand the decision in the House of Lords, it was held that the statute which limits the liability of the owner is not to be applied until the liability, irrespective of that statute, is ascertained according to the ordinary rules of the Court of Admiralty. In the Court of Admiralty, where there were counter charges against two vessels for the same collision, both parties either seized the two ships in the Admiralty, or if they could not seize the ship, they brought the parties before the Admiralty. Each, therefore, was the plaintiff in an action. There were two actions, but by the practice of the Court of Admiralty as stated by Dr. Lushington, judges of the Admiralty Court always exercised a power which the common law could not. Where there were counter-claims in respect of the same transaction, although the actions were brought by the opposite parties as separate actions, which they were at the commencement of the actions by reason of the seizures of the ships effected at different times, the Court of Admiralty consolidated the actions for the purposes of the trial. They tried the cross suits at the same time if it was convenient, but if it was inconvenient they had the power of trying them at different times. But then they exercised this further power, that where there were cross actions in respect of the same transaction, having determined the liability in respect of the parties in the two actions the Court of Admiralty would not issue that which was necessary for execution to each of them, and leave them to settle what were the amounts, but the Court of Admiralty issued its execution for the balance. Therefore it was only one party who eventually could be made to pay. In construing 25 & 26 Vict. c. 63, s. 54, for limiting the liability of the shipowner to a certain amount per ton for his vessel, it is to be recollected that it is an

(1) 7 App. Cas. 795.

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enactment founded upon the assumption that the vessel is the thing out of which the damages are to be paid, because where a ship was seized in the Court of Admiralty, and there was a decree against the owner, all that the Court could do was to order the ship to be sold, and if she did not fetch the amount of the damage to the other ship then the owner only got what the ship was worth. But where the ship would fetch more than the damage, the legislature limited the liability of the ship to 8*l.* a ton, and upon that enactment, passed for those reasons, the House of Lords held that that statute was not to apply until the monition was ready to be issued, and if it were not for that statute the monition would go for the whole amount. Is that kind of reasoning applicable to 17 & 18 Vict. c. 104, s. 388? It seems to me that it is not. This section is not to be applied at the end of the trial, but at the beginning. The Court is trying to find out what was the liability of the parties before the action was brought, and this s. 388 deals with that for which a shipowner shall be responsible, and that for which he shall not. In my judgment the enactment is not really wanted, but it was put into 17 & 18 Vict. c. 104, in order that there should be no doubt. Before this Act of Parliament, when a pilot was on board a vessel by compulsion, the common law and all laws, one would think, held that the owners of the vessels should only be liable for the negligence of their own servants. According to the law of England they were liable for the negligence of their own servants, but for the conduct of a pilot put on board their ship, whom they were obliged to take, and over whom they had no check, the Act of Parliament directed that they were not liable. But the Act of Parliament held they were responsible for their servants. That being so, the result is that the shipowner cannot be held liable for the wrongful act done by a person on board by compulsion of law, and therefore he is not liable in respect of a collision which is caused solely by the fault of the pilot. The judgments in the Court of Admiralty, I cannot help thinking, have always been drawn up in the same form as the one under discussion. It is certain that the judgment in the case of *The Demetrius* (1) was drawn up in that way. I cannot see any ground for thinking that that judgment was an isolated case. I

(1) Law Rep. 3 A. & E. 523.

firmly believe that if we looked through the registry of the Admiralty Court, we should find that over and over again cases similar to this have arisen. But take the Act of Parliament as applicable to the liability of the owners of the *Hector*, and what is the result? A collision has happened between these two vessels, each party, if the action was brought in the ordinary way, bringing the ship of the other before the Admiralty Division, where cross-actions are instituted. With regard to the *Augustus*, she was found to blame for the collision, therefore she is, in the first instance, liable to pay all the damage which the *Hector* has suffered. With regard to the *Hector*, it is found that her owners are not to blame, but that her navigation was to blame; but that was the fault of the pilot. The owners are not liable for his default, therefore they are not liable for anything to the owners of the *Augustus*. What is the result? That the liability of the owners of the *Augustus* is declared to have been proved, but the liability of the owners of the *Hector* is disproved, and they are dismissed from the suit. Therefore no balance is to be calculated; the owners of the *Hector* are not liable for a single pennyworth of the damage done to the *Augustus*. The owners of the *Augustus* must go against the pilot and get what they can out of him; but the *Hector* is entitled to succeed. If s. 388 of 17 & 18 Vict. c. 104, alone governed the law, I should hold that the *Hector* was entitled to succeed as to the whole. That is the logical consequence. But in the Court of Admiralty there has been a uniform practice in these suits for damage, that where it is found that the navigation of one ship was bad through the wrongful act of the compulsory pilot, her owners recover only half the damage. That is the manner in which the judgment is drawn up in the present case, and it must be held to be right.

COTTON, L.J. I think that we must assume that this order is properly drawn up. Reliance has been placed by the counsel for the owners of the *Augustus* upon this, that 17 & 18 Vict. c. 104, s. 388, and 25 & 26 Vict. c. 63, s. 54, are the same in point of construction, and the same consequence will follow in the one as in the other. They ask, what is the difference between "being answerable to any person" and "being answerable in damages"?

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The answer is, "None." But that is not the question. 17 & 18 Vict. c. 104, s. 388, does not limit the amount which a person is to pay when found liable, but provides that the owner is not to be liable when the ship is compulsorily under charge of a pilot, and declares that for the act of the pilot compulsorily employed he is not liable. Therefore the action against the owner must be dismissed. But 25 & 26 Vict. c. 63, s. 54, is different. It assumes that an owner is liable for damages. It does not relieve him in any way from liability for damage done by his ship; it only provides that although he is liable in damages, yet he shall not be liable to pay for that for which he is liable more than a certain amount. Therefore it seems to me to be totally different from the other enactment. The owners of the *Hector* being not responsible for the pilot's act, there can be no balance for the purpose of ascertaining what should be the amount to be paid. But it has been argued that the House of Lords decided to the contrary in the case of *The Khedive*. (1) Is that so? The Law Lords merely pointed out at what stage of the proceedings the limit of liability laid down by the statute applies if there has been negligence on the part of the masters and the crew, and if there has been an interlocutory judgment for the purpose of binding and fixing the amount for which the owners are respectively liable.

The judgment of the House of Lords applies only to cases where the owners of both vessels are liable in consequence of the collision having been occasioned by those for whose acts they are answerable, that is, the master and the crew. Of course when that is so, the damages must be divided for which they are liable, and the balance paid to the one to whom it is due. But here the owners of the *Hector* not being liable, there cannot be any division, because there are not two amounts to be put together for the purpose of ascertaining what the balance is. Therefore, in my opinion, that judgment is not in any way applicable to the present case, and the view taken by the Master of the Rolls is right, and the motion must be dismissed.

BOWEN, L.J. I am of the same opinion. It appears to me that there is a broad distinction between 17 & 18 Vict. c. 104,

(1) 7 App. Cas. 795.

s. 388, and 25 & 26 Vict. c. 63, s. 54. The latter enactment seems to me to be a section which assumes a case where the liability of the owner exists, and then prescribes the measure of damages. But s. 388 of 17 & 18 Vict. c. 104, has nothing to do with any measure of damages at all. It takes away the owner's liability, and so far from assuming that the owner's liability exists, it enacts that the owner shall not be liable, and if that is true as regards that section, the judgment given by the Master of the Rolls and Cotton, L.J., must follow by a necessary chain of logic.

Motion dismissed.

Solicitors for Owners of the *Augustus*: *Stokes, Saunders, & Stokes.*

Solicitors for Owners of the *Hector*: *Pritchard & Sons, for Thornely & Dismore, Liverpool.*

J. E. H.

THE ISIS.

Nov. 13.

Salvage—Pleading—Statement of Claim—Rules of Supreme Court, 1883, *Order XIX., rr.* 5, 7—*Appendix C., Form No.* 6.

A statement of claim in a salvage action was drawn in the Form No. 6 of Appendix C. to the Rules of the Supreme Court, 1883; on motion by the defendants under Order XIX., rule 7, for a further and better statement of claim or particulars:—

Held, that the plaintiffs must deliver a fuller statement of claim, and that in salvage actions a fuller form than that given in Appendix C, No. 6, should generally be followed.

MOTION by the defendants in an action of salvage "to direct the plaintiffs to deliver a further and better statement of claim, or such particulars as would give the defendants sufficient information of the nature and circumstances of the alleged salvage services rendered by the respective plaintiffs to the steamship *Isis*, to enable the defendants to have the opportunity of making a tender in the action." The statement of claim, which was in exact conformity with the Form No. 6, in Appendix C. to the Rules of 1883 was as follows: "The plaintiffs William Hoods and sixteen others above named are the owners, master, and crew of the

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yawl *Band of Hope*, of Winterton, in the county of Norfolk. The plaintiffs Charles Larter and nineteen others abovenamed are the crew of the Royal National Lifeboat Institution lifeboat *Husband of Winterton*. The other plaintiffs are the Great Yarmouth Steamtug Company, Limited, who are the owners of the steamtugs *United Service*, *Express* and *Meteor*, and the masters and crew thereof respectively. The said plaintiffs rendered salvage services to the derelict steamship *Isis* on the Hasbro' Sands, and off the coast of Norfolk during the 19th, 20th, 21st, and 22nd of September, 1883." Then followed the particulars of the value of the several vessels, and of the damage sustained by the salvors.

Phillimore, in support of the motion. The defendants do not know if the plaintiffs allege that there was any risk to life, or what the plaintiffs will say was the state of the sea or the weather, whether there was any danger, or what degree of danger, and they have, therefore, no guide as to making a tender. It may be that they would only consider the facts slightly exaggerated, or they may agree with the plaintiff's view of them and argue only as to the amount of the reward. In both of the latter possibilities they would not keep witnesses for the hearing. They apply under Order XIX., rule 7.

Aspinall, for the plaintiffs. The Rules say the forms in the schedule shall be followed, and this pleading is in the form directed to be used by Order XIX., rule 5.

[SIR JAMES HANNEN. The forms must be followed so far as they are sufficient, the rule overrides the forms.]

Then if the defendants are not satisfied with the statement of claim they must come for particulars.

[SIR JAMES HANNEN. We wished by these Rules to avoid application for particulars.]

Phillimore, in reply. The defendants wish for full information in the claim, and not for particulars.

SIR JAMES HANNEN. The forms appended to the Rules are only to be taken as specimens of the character of the pleadings, and are not to be slavishly adhered to, though the pleader must

endeavour to state the case in as succinct a form as possible. My decision applies only to this particular case which is now before me, but I must add that in salvage actions it will, I think, usually be found necessary to adopt a form of pleading more nearly approaching to the old forms. In salvage actions the defendant often admits the plaintiff's statement of the facts, and the case then proceeds on this basis. It would cause great additional expense if the plaintiff, when the facts are admitted, were obliged to bring his witnesses to expand the facts summarised in a statement of claim as they would be under the new forms, and if the defendant on his part were to keep his witnesses to meet facts which do not appear in the statement of claim, but which it is not prudent for him to be unprepared to meet. In the present instance I think that the statement of claim is not sufficiently full for the purpose of giving the defendants the information which they are entitled to, and I therefore order that the claim be amended as asked by the motion.

Solicitors for plaintiffs: *Pritchard & Sons.*
Solicitors for defendants: *T. Cooper & Co.*

E. S. R.

END OF VOL. VIII.

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1884, will be as follows:—

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See Practice—Alimony.

BIGAMY—*Petitioner.*] A husband believing that his wife was dead married again, and subsequently discovered that his wife was alive and had committed adultery:—*Held*, that, notwithstanding the bigamy, he was entitled to a dissolution of his marriage. Freegard *v.* Freegard, Cowper, & Lucas - - - - - - 186

CASES:

—— *Latham* v. *Latham* (2 Sw. & Tr. 298) overruled - - - - 188
See Practice—Alimony.

CHILDREN, CUSTODY OF — Maintenance — Security - - - - - 161
See Practice—Children, Custody of.

CONDONATION—*Cruelty—Revival by subsequent Adultery.*] A husband had been guilty of cruelty. He and his wife separated under the provisions of a deed by which it was agreed that no proceedings should be taken by either party against the other in respect of any cause of complaint which had arisen before the date of the deed, and that every offence, if any, committed by either party against the other should be considered as condoned, and that in any proceedings by either party against the other in respect of any cause of

CONDONATION—*continued.*
complaint which might thereafter arise, no offence committed by either party before the deed should be pleaded or be admissible in evidence:—*Held*, affirming the decision of the President, that subsequent adultery by the husband did not revive the wife's right to complain of the cruelty committed before the deed, so as to enable her to obtain a decree for dissolution of the marriage.—Whether adultery by a husband which has been condoned is a bar to his obtaining a dissolution on the ground of subsequent adultery of the wife, *quære*. Rose *v.* Rose - - - **C. A. 98**

2. —— *Desertion — Revival.*] A husband having been guilty of desertion and adultery the wife forgave him and they returned to cohabitation. He subsequently committed adultery:—*Held*, that the subsequent adultery revived the desertion, and that the wife was entitled to a dissolution of the marriage. Blandford *v.* Blandford - - - - - - 19

COVENANT—To pay annuity—Power to reduce amount payable - - - 159
See Settlement, Variation of.

CRUELTY—Condonation—Subsequent adultery—Revival - - - - 98
See Condonation.

DELAY—Poverty of petitioner - - 21
See Practice—Delay.

DESERTION — Condonation — Subsequent adultery—Revival - - - 19
See Condonation.

—— By wife—Judicial separation - - 187
See Practice. 3.

MAINTENANCE—Children—Security by respondent - - - - - 161
See Practice.

—— Application by wife divorced on husband's petition - - - -
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PARTIES—Application to be made respondent
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PENSION—Indian officer—Sequestration - 163
See Practice—Sequestration.

PETITIONER—Bigamy—Divorce - - 186
See Bigamy.

PRACTICE—*Alimony pendente lite—Decree Nisi*—20 & 21 *Vict. c.* 85, *s.* 32—23 & 24 *Vict. c.* 144, *s.* 7.] The Court has power to order alimony pendente lite notwithstanding a decree nisi has been made for dissolution of marriage.—*Latham* v. *Latham* (2 Sw. & Tr. 298) overruled. Ellis *v.* Ellis [C. A. 188

2. —— *Unreasonable Delay—Poverty of Petitioner—Previous Decree for Judicial Separation.*] A husband in 1878 obtained a judicial separation, and 50*l.* damages against the co-respondent, but he took no steps to recover the damages. The wife continued to cohabit with the co-respondent, and in 1882 the husband petitioned for a dissolution of his marriage. The reason which he gave for the delay and for not enforcing the claim for

PRACTICE—*continued.*
damages was that he had no money, being only in receipt of weekly wages, and that he hoped his wife would come back and live with him:—*Held*, reversing the decision of the President, that the delay was not unreasonable, and that the petitioner was entitled to a decree. Mason *v.* Mason [C. A. 21

3. —— *Judicial Separation — Desertion by Wife.*] Judicial separation decreed by reason of the wife's desertion of her husband for two years and upwards without reasonable cause. Millar *v.* Millar - - - - - 187

4. —— *Maintenance—Maintenance of Wife against whom a Decree for Dissolution has been made*—20 & 21 *Vict. c.* 85, *s.* 32.] A decree nisi for dissolution of marriage was made against a wife on the 3rd of August, 1880, and was made absolute in due course. The wife appealed, and her appeal was dismissed on the 19th of July, 1881. On the 30th of July she took out a summons to have permanent maintenance allowed her. Owing to her absence abroad the summons was not heard till December, 1882, when the President dismissed it. The wife appealed:—*Held*, on appeal, that as the application to the President was out of time, and he had exercised a discretion under the special circumstances of the case, the Court would not interfere with his decision.—Whether special circumstances are required to induce the Court to give permanent alimony to a wife against whom a decree for dissolution is made, and who has no means of support, *quære*. Robertson *v.* Robertson and Favagrossa [C. A. 94

5. —— *Children, Custody of—Maintenance—Security.*] Upon a decree for judicial separation when the Court has ordered a provision to be made for the children it has no power to order also that the respondent shall secure the payment. Hunt *v.* Hunt - - - - 161

6. —— *Parties—Alleged Adulteress.*] In a suit by a wife for dissolution of marriage, the Court, upon application on behalf of the person with whom it was alleged that the husband had committed adultery, directed that she be made a respondent. Bell *v.* Bell - - - 217

7. —— *Sequestration—Indian Officer's Pension.*] The pension of an officer in the Indian army is not liable to sequestration for payment of costs and permanent maintenance. Birch *v.* Birch - - - - - - 163

SETTLEMENTS—*Variation of—Covenant to pay Annuity.*] The Court has power to vary a post-nuptial settlement contained in a deed of separation by reducing the amount of an annuity which the husband has covenanted to pay. Jump *v.* Jump - - - - - - 159

SEQUESTRATION—Pension of Indian officer 163
See Practice—Sequestration.

STATUTES:
20 & 21 Vict. c. 85, s. 32 - - - 188
See Practice—Alimony.
23 & 24 Vict. c. 144, s. 7 - - - 188
See Practice—Alimony.

ECCLESIASTICAL.

ECCLESIASTICAL LAW—*Application by Bishop of Diocese for Discharge of Clerk in Custody for Contempt—Deprivation under Provisions of Statute Law—Satisfaction of Contempt by involuntary Obedience—Public Worship Regulation Act*, 1874 (37 & 38 *Vict. c.* 85), *s.* 13—53 *Geo.* 3, *c.* 127.] At the hearing of the matter of a representation made under the Public Worship Regulation Act against the rector of a parish church in the diocese of Manchester and province of York, the Official Principal of the Chancery Court of York pronounced that the defendant when officiating in the parish church had committed certain offences against ecclesiastical law, and on the 27th of June, 1879, issued a monition admonishing him to refrain from such offences for the future. The defendant failed to obey the monition, and the Official Principal, in August, 1879, by an inhibition under the Public Worship Regulation Act, inhibited him for three months, and, until the inhibition had been relaxed, from performing the services of the church or exercising the cure of souls within the diocese of Manchester. Whilst the inhibition was still in force the defendant disobeyed it by officiating in the parish church on several occasions, and thereupon his consent was signified to the Queen in Chancery, and he was in March, 1881, taken into custody under a writ de contumace capiendo. In August, 1882, the defendant still remained in custody under the writ, but, by the operation of the Public Worship Regulation Act, ceased to be rector of the parish. The Bishop of Manchester then applied to the Official Principal for the discharge of the defendant. The application was neither supported by the defendant nor opposed by the complainants:—*Held*, that the application was rightly made by the Bishop of Manchester:—*Held*, also, that the defendant had "satisfied his contempt" within the meaning of 53 Geo. 3, c. 127, and that a writ of deliverance in the form prescribed by that statute ought to issue for his discharge. Dean *v.* Green - - 79

2. —— *Church Discipline Act* (3 & 4 *Vict. c.* 86)—*Offences against Ritual—Resignation of Benefice pending a Suit—Operation of Sentence of Deprivation.*] The ordinary sentence of deprivation in use in the ecclesiastical courts is not limited to the particular preferment or benefice stated in the articles to be held by the respondent, but extends to all ecclesiastical promotions within the jurisdiction held by the respondent at the time that sentence is pronounced.—It is contrary to the practice of the Court of Arches to pronounce a sentence of perpetual suspension from the performance of divine service against a respondent who holds a benefice of which the Court has jurisdiction to deprive him.—The articles in a criminal suit by letters of request under the Church Discipline Act contained allegations charging that the respondent was perpetual curate of the parish of A., in the diocese of London, and that he had within two years of the institution of the suit committed repeated and aggravated offences against the laws ecclesiastical in matters of ritual whilst officiating in the performance of divine service in the parish church of A. At the hearing of the suit the above-mentioned allegations were held to be proved, and the Official Principal, in his discretion, condemned the respondent in costs, but refused to pronounce any sentence of deprivation or canonical punishment. The promoter appealed, and the appeal having been allowed the Queen in Council remitted the cause, with an intimation that the respondent ought to be canonically punished. After the cause had been so remitted, but before the terms of the remission had been complied with, the respondent resigned the perpetual curacy of A. and was instituted to the incumbency of P. in the diocese of London.—On the cause subsequently coming on for sentence, the Official Principal of the Court of Arches pronounced sentence depriving the respondent of all ecclesiastical promotions within the province of Canterbury of which he was possessed when the sentence was pronounced and of all the ecclesiastical emoluments thereto belonging. Martin *v.* Mackonochie (Third Suit) - - - 191

ADMIRALTY.

APPORTIONMENT—Salvage - - 24
See Salvage.

BILL OF LADING—Failure to land goods—Duty of shipowner - - - 178
See Ship.

CASES—*Brunsdon* v. *Allard* (2 E. & E. 19) approved - - - - 144
See Practice. 2.

—— *Libra, The* (6 P. D. 139) explained - 126
See Navigation. 4.

—— *Linda Flor, The* (Sw. 309) followed - 39
See Practice. 6.

CASES—*continued.*

—— *Sullivan* v. *Pearson, In re. Morrison, Ex parte* (L. R. 4 Q. B. 153) approved - 144
See Practice. 2.

COSTS—Collision—Both vessels to blame - 218
See Navigation. 2.

—— Compromise by parties—Solicitor's lien 144
See Practice. 2.

COUNTERCLAIM — Salvage — Misconduct of Salvors - - - - 147
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DAMAGES, MEASURE OF — Collision — Compulsory pilotage - - - 218
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FREIGHT—Insurance—Sum of money in nature of freight—Advance for necessaries 155
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HARBOUR—Infringement of regulations - 56
See Towage.

INSURANCE—Subrogation—Advanced freight
See Practice. [155
—— Payment of premiums—How far necessaries
See Ship. 3. [151

JURISDICTION—*Wages—Foreign Ship—Protest by Foreign Consul—Discretion of Court.*] In an action for wages and damages for wrongful dismissal by British seamen who had served on a Spanish ship under Spanish articles, the Spanish consul at Liverpool protested against the exercise of the jurisdiction of the Court, and the Court accordingly dismissed the action:—*Held*, on appeal, that to enable the Court of Appeal to overrule the discretion of the Court below as to entertaining the action, the judge must be shewn to have exercised it on wrong principles or wrongly or unfairly.—*Held*, further, that though no express provision of the Spanish code was referred to in the articles, and though it did not appear in evidence that the Spanish code compelled the seamen to abide by the decision of a Spanish tribunal, yet that, under the circumstances, it must be inferred that they had agreed to do so. The Leon XIII - - C. A. 121

LAUNCH—Reasonable precautions—Mersey 119
See Navigation. 3.
LIEN—Priority—Damage—Wages - - 129
See Practice. 5.

MERSEY—Launch—Reasonable precautions 119
See Navigation. 3.

NAVIGATION—*Damage—Construction of Tees Conservancy Regulations—"Maximum Speed of Six Miles per Hour."*] The 22nd clause of the bye-laws of the river Tees, which provides that no steamship shall be navigated on any part of the river Tees at a higher rate of speed than six miles per hour, is to be construed as prohibiting a steamship proceeding against the tide being navigated at a greater speed than six miles per hour over the ground. Decision of the Admiralty Division (7 P. D. 49) reversed. The R. L. Alston [C. A. 5

2. —— *Damage—Collision—Appeal—Costs—Compulsory Pilotage — Measure of Damages.*] Where a collision has occurred between two vessels, through the bad navigation of each of them, the owners of the ships are not entitled to the costs of any litigation arising out of the collision. Where a collision has occurred between two vessels through the bad navigation of each of them, and where one of the vessels, by compulsion of law, has had on board a pilot whose default has contributed to the accident, the owner of that vessel is entitled to recover a moiety of the damage sustained by her without any deduction on account of the damage sustained by the other. The Hector - - - - - 218

3. —— *Collision—Launch—Duty of Tugs in the Mersey.*] Persons in charge of a launch are bound to take the utmost precautions to avoid injury to passing vessels, such precautions being in the circumstances no more than reasonable. It is their duty to have a tug in attendance on a launch in the Mersey, decorated so as to indicate that a launch is imminent, and, if necessary, to warn approaching vessels. The George Roper [119

4. —— *Collision—Thames Rules, No.* 23.] A steamship the *C. S.* left the South West India Docks nearly opposite the curve of Blackwall Point, and proceeded down stream at easy speed against a flood tide. In a few minutes, as she was about to round Blackwall Point, she perceived the steamship *M.* in Bugsby's Reach, and preparing to round the point; the *C. S.* stopped and reversed her engines, but a collision between the *C. S.* and the *M.* took place:—*Held*, that rule 23 of the Thames Rules did not apply under the circumstances to the *C. S.*—*The Libra* (6 P. D. 139) explained. The Margaret - 126

5. —— *Damage—Duty of Steamship under way in dense Fog—Regulations for Preventing Collisions at Sea, Arts.* 13, 18, 20.] It is the duty of those who have charge of a steamship in motion during a dense fog, on first hearing the whistle of a steamship in such close proximity to them that risk of collision between the two vessels is involved, to bring their vessel immediately to a standstill on the water, and not execute any manœuvre with their helm until they have definitely ascertained the position and course of the other ship. The Kirby Hall - 71

6. —— *Damage—Compulsory Pilotage—25 & 26 Vict. c.* 63, *s.* 41.] The word "loading" in 25 & 26 Vict. c. 63, s. 41, does not refer to the taking on board of cargo only. Therefore when a steamer anchored in Dartmouth Harbour, and took on board twenty tons of coal for the purposes of the voyage, and was bound from a place out of the outport district to a destination also out of it:—*Held*, that she was not exempt from the obligation to employ a pilot. The Winston [176

7. —— *Damage—Compulsory Pilotage—Hull Pilot Act* (2 & 3 *Wm.* 4, *c. cv.*)—*Default of Pilot.*] A collision occurred in the Humber Dock, Hull, between a fly-boat and a foreign schooner bound to the Prince's Dock. The schooner was in charge of a duly licensed Humber pilot who had taken over the charge of the schooner while she was moored at a pier in the Humber from the pilot who had brought her in from sea. One sum was paid for the services of the two pilots:—*Held*, that the schooner was in charge of a pilot whose employment was compulsory by law. The damage was done by the fluke of the schooner's anchor piercing the side of the fly-boat. The

NAVIGATION—*continued.*
Court found that there was no want of care in the crew in lowering the anchor. The other allegations against the schooner were that the anchor was improperly slung; that she came too fast up the dock and without a check rope:—*Held*, that the damage was caused by the fault of the pilot in the course of his duty. The Rigborgs Minde [132

8. —— *Damage—Registrar and Merchants—Consequential Loss—Loss of Fishing—Evidence.*] A French fishing brig of 142 tons, employed in the cod fishery off the banks of Newfoundland, came into collision on the 6th of July, 1881, with an Italian barque, and in consequence of the collision was compelled to put into port for repairs, but, her repairs having been completed, returned to the fishing ground before the close of the fishing season. In an action of damage instituted on behalf of the owners of the brig against the barque, the Court pronounced the barque solely to blame for the collision, and referred the question of damages to the registrar and merchants. At the reference the plaintiffs claimed 1200*l.* for demurrage of their vessel from the date of the collision to the 26th of August, 1881, the date of her return to the fishing ground, and of the amount so claimed, the registrar, by his report, allowed the plaintiffs 880*l.* as the loss sustained by the interruption of their fishing. The defendants moved the Court in objection to the report:—*Held*, that the motion must be dismissed. The Risoluto - - - 109

NECESSARIES—Insurance—Payment of premiums—Mode of advancing money 151
See Ship. 3.

NEGLIGENCE—Condition exempting from liability - - - - - 56
See Towage.

PILOTAGE—Compulsory—"Loading" - 176
See Navigation. 6.
—— Compulsory—Default of pilot - 132
See Navigation. 7.
—— Compulsory—Hull Pilot Act - - 132
See Navigation. 7.

PRACTICE—*Collision—Sum in the Nature of Freight—Bill of Lading—Right of Action.*] A ship *A.* and her cargo belonged to the same owners, and the plaintiffs advanced 1000*l.* as a loan to such owners, and received as security, in conformity with the agreement made between them and the borrowers, the bill of lading, on which the master indorsed a receipt for 1000*l.* as advanced freight, and also a policy of insurance on advanced freight. Ship *A.* was lost through a collision with the defendants' vessel, whose negligence was admitted. It was proved that the difference between the value of the cargo at the port of destination and at the port of loading would have considerably exceeded 1000*l.* In an action by the holders of the bill of lading for 1000*l.* against the defendants' ship:—*Held*, that the plaintiffs were entitled to recover the sum, though it was not, strictly speaking, advanced freight, but a prospective increase in the value of the cargo, but that the insurers were subrogated to the rights of the plaintiffs.—A sum in respect

PRACTICE—*continued.*
of disbursements for ship *A.* on her voyage and wages paid in advance had been awarded to the owners of the *A.* by the registrar and merchants:—*Held*, further, that this was no bar to the plaintiffs' right to recover in this action. The Thyatira - - - - - 155

2. —— *Compromise—Solicitors' Costs.*] In an Admiralty action for wages the plaintiffs and defendants compromised the action by payment to each of the plaintiffs of a certain sum in discharge of the claim and costs. The plaintiffs left the country without paying their solicitors' costs:—*Held*, by the Court of Appeal, reversing the judgment of Sir R. J. Phillimore, that as there was no evidence that the parties had made the settlement with the intention of depriving the plaintiffs' solicitors of their lien for their costs, the defendants ought not to be ordered to pay the plaintiffs' taxed costs.—*Brunsdon* v. *Allard* (2 E. & E. 19), *In re Sullivan* v. *Pearson*, *Ex parte Morrison* (L. R. 4 Q. B. 153) approved. The Hope [C. A. 144

3. —— *County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *s.* 6—*Transfer of Action after judgment recovered—Pending Actions in High Court—Discretion.*] A foreign vessel was under arrest in three actions of necessaries, one in the City of London Court and the other two in this Court, and after judgment pronounced in the City of London Court was about to be sold by the bailiff of that Court. In these circumstances the plaintiff in one of the actions in this Court applied for an order to transfer the action in the City of London Court to this Court, alleging that a sale by the marshal would be to the benefit of all parties.—The Court made the order, but directed that it should be without prejudice to any priorities claimed by the plaintiff in the action ordered to be transferred. The Immacolata Concezione - - - - - 34

4. —— *Damage—Lis Alibi Pendens—Stay of Proceedings.*] In an action of damage in personam by the owners of the ship *G.* against the owners of the ship *P.* it appeared that a cause of damage in rem relating to the same collision had, prior to the proceedings in this Court, been instituted by the owners of the *P.* against the *G.* in a Vice-Admiralty Court abroad, and was then pending. The Court, on the application of the owners of the ship *P.*, stayed the proceedings in this Court until after the hearing of the cause in the Vice-Admiralty Court abroad. The Peshawur - - - - - - 32

5. —— *Damage—Wages—Priority of Liens.*] The maritime lien for damages, arising out of damage done by a foreign vessel in a collision for which she is to blame, takes precedence of the maritime lien of the seamen for wages earned by them since the collision on board such vessel. The Elin - - - 39; C. A. 129

6. —— *Damage—Maritime Lien—Priority of Damage Claimant over Claimants for Wages earned subsequent to Collision.*] The maritime lien, arising out of damage done by a foreign vessel in a collision for which she is to blame, takes precedence of the maritime lien of the seamen on board such vessel at the time of collision for wages earned by them subsequently to the

PRACTICE—*continued.*
collision.—*The Linda Flor* (Swa. 309) followed. The Elin - - - - - - 39

7. —— *Salvage—Pleading—Statement of Claim—Rules of Supreme Court*, 1883, *Order XIX., rr.* 5, 7—*Appendix C., Form No.* 6.] A statement of claim in a salvage action was drawn in the Form No. 6 of Appendix C. to the Rules of the Supreme Court, 1883; on motion by the defendants under Order XIX., rule 7, for a further and better statement of claim or particulars:—*Held*, that the plaintiffs must deliver a fuller statement of claim, and that in salvage actions a fuller form than that given in Appendix C, No. 6, should generally be followed. The Isis - - 227

8. —— *Third Party—Rules of Supreme Court*, 1875, *Order XVI. rr.* 18, 21—*Vessel at Anchor—Tow and Tug.*] In an action for damage by collision brought by a vessel at anchor against a vessel in tow of a tug, the owners of the tug were made third parties under Order XVI. rule 18, as the defendants claimed to be indemnified by the owners of the tug against the plaintiffs' claim on the ground that the improper navigation, if any, was that of the tug. An application for directions under Order XVI. rule 21 was subsequently made, and the plaintiffs thereupon asked that the third parties should be dismissed from the action on the ground that the plaintiffs would be embarrassed by the proceedings between the defendants and the third parties:—*Held*, that the third parties must be dismissed, as under the circumstances questions would probably arise between them and the defendants by which the plaintiffs might be embarrassed, as they were different from those upon which the action between the plaintiffs and defendants would turn. The Bianca - - - - - - - 91

RULES:
—— Order XVI. r. 21 - - - 91
See Practice. 8.
—— Order XIX. rr. 5, 7 - - - 227
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SAILING RULES—Tees conservancy regulations
See Navigation. [5
—— Steamship—Fog—Arts. 13, 18, 20 - 71
See Navigation. 5.
—— Thames—No. 23 - - - 126
See Navigation. 4.

SALVAGE—*Agreement—Life Salvage—No Res saved—Right of Salvors to bring Action—Validity of Salvage Agreement.*] A steamship was requested by another steamship in distress to stand by her. An agreement was accordingly made between the two masters for a fixed sum that the sound vessel would remain by the damaged one till she was in a safe position to get to port. The sound vessel remained by the damaged one until the latter was about to sink, when she took her crew on board, and the damaged steamer immediately afterwards sank. The owners, master, and crew of the salving ship brought an action for life salvage:—*Held*, that as no res was saved the action would not lie either as a salvage action simply or on the agreement.—Observations of

SALVAGE—*continued.*
Brett, M.R., as to the implied authority of shipmasters to enter into salvage agreements. The Renpor - - - - C.A. 115

2. —— *Amount of Award.*] In a most meritorious case of salvage, where a steamship which had got aground on the shore of the Red Sea, ninety-five miles from Suez, in such a position that without help she must before many hours had elapsed have been lost with all hands on board her, was towed off the shore and to within a few miles of Suez by another steamship, the Court, on a value of 62,000*l.*, awarded to the salvors 6000*l.* The Lancaster - - 65

3. —— *Derelict—Amount of Award—Apportionment.*] The master of a Norwegian brig bound to Cardiff, with a crew of nine men, fell in, in the North Sea between Heligoland and the Dogger Bank, with a derelict vessel in a very crippled condition, and put his mate and two of his crew on board her. The mate and the two men on board the derelict shortly after they had boarded her, fearing that she was about to founder, endeavoured to leave her, but their boat was swamped, and one of the men drifted astern, and was picked up by a fishing smack. The mate and the other hand succeeded in bringing the derelict safely into the English Channel, and within three miles of Dungeness; she was then taken in tow by a steamship and towed to the entrance of Dover Harbour, within which she was subsequently placed in safety.—Actions of salvage were instituted by the owners, master, and crew of the brig, and by the owners, master, and crew of the steamship against the derelict vessel and her cargo, and the Court awarded a moiety of the value of the property proceeded against, and apportioned three-fifths of the amount to the owners master, and crew of the brig. The Livietta - - - - - 24

4. —— *Evidence—Loss of Earnings by and Damage to Salving Ship.*] In an action for salvage, evidence of the loss of earnings by and of the costs of repairing damage done to the salving vessel in consequence of rendering salvage services is admissible. But these sums are to be regarded as elements for consideration in estimating the amount of the salvage reward, but are not to be considered as fixed amounts to be awarded to the salvors in respect of these matters. The Sunniside - - - - 137

5. —— *Misconduct of Salvors—Counter-claim.*] The master and crew of the *Y.*, a vessel in distress, got on board the *K.*, a steamer standing by her. The mate and two of the crew of the *K.* afterwards went on board the *Y.* but refused to take her master back with them. The mate subsequently also refused the services of a steam-tug, and finally having from want of local knowledge anchored the *Y.* in an insecure place, she began to drift, was forsaken by the salvors, and sank. She was subsequently raised by her owners at considerable expense. In an action for salvage the owners of the Y. denied that a reward was due, and counter-claimed for damages:—*Held*, that the mate was guilty of misconduct in refusing to take the master of the *Y.* on board of her, and to engage the services of the tug; but that if the *Y.* had been ultimately saved such misconduct

SALVAGE—*continued.*

would have worked a partial forfeiture of the reward only:—*Held*, further, that as the loss arising from the misconduct of the salvors was probably equal to that from which the *Y.* was first rescued, no salvage reward was due.—Counter-claim for damages dismissed. The Yan-Yean - - - - - - - 147

6. —— *Priority of Claims—Foreign Consul—Payments of Viaticum—Solicitor*—23 & 24 *Vict. c.* 127, *s.* 28.] Salvage actions were brought against an Italian vessel, and she was sold by order of the Court. After the salvors had been remunerated, the balance of the fund in Court was insufficient to satisfy the costs of the solicitors who had appeared in the above actions for the parties interested in the ship, and who sought to enforce their claim for such costs by virtue of 23 & 24 Vict. c. 127, s. 28, as well as the claim of the Italian consul in respect of the expenses of sending the crew back to Italy. It was proved that by the law of Italy such expenses and the keep of the master and crew ranked next to the salvage payments:—*Held*, that the claim of the Italian consul had priority to that of the solicitors. The Livietta - - - - - 209

—— Pleading—Statement of claim - 227
See Practice. 7.

—— Priority of claims—Solicitor—Viaticum 209
See Salvage. 6.

SHIP — *Bill of Lading — Merchant Shipping Amendment Act*, 1862 (25 & 26 *Vict. c.* 63), *s.* 67 *—Failure of Cargo Owner to take Goods—Duty of Shipowner—Notice.*] When goods are landed under sub-s. 6, 25 & 26 Vict. c. 63, s. 67, sub-s. 7, does not apply, for the latter refers only to the discharging of cargo overside, and not to the landing of it for the purposes of assortment on the wharf, and the written notice referred to in sub-s. 7 applies, therefore, to cases arising under that sub-section only.—It is the duty of the owner of the goods who receives either a written or verbal notice that he can have them to take them away within a reasonable time, and that whether sub-s. 6 or 7 applies to the case.—Notice to the lighterman employed by the owner of the goods is notice to the owner himself.—A ship arrived in dock with a general cargo on the 12th of December, and began to unload on the quay on the 13th. The plaintiffs (owners of some of the goods) sent a lighterman and barge to receive their portion of the cargo on the 13th. It was not then ready. On the 14th the lighterman again attended but could obtain no information. On the 14th the firm of lightermen wrote to the defendants (the shipowners), stating they had made application for the goods and enclosing a notice requiring twenty-four hours' notice of the defendants' readiness to deliver the goods, and stating that they would not be responsible for any landing charges. On the 15th the landing of the cargo was completed, and the lighterman was that day verbally informed he could have the goods on the morning of the 16th. He did not attend, and the goods were not taken away till the 29th. The plaintiffs paid the dock charges under protest, and brought an action to recover them back:—*Held*, that they could not recover them. The Clan Macdonald - - 178

SHIP—*continued.*

2. —— *Master—Disbursements—The Admiralty Court Act*, 1861 (24 *Vict. c.* 10), *s.* 10—*Liability in respect of Judgment recovered in action on Bill of Exchange drawn by Master and dishonoured—Maritime Lien.*] In April and May, 1880, the master of a steamship obtained at a British colonial port coals for the ship, and paid for them by bills of exchange drawn on the charterers of the ship. The bills were dishonoured by the charterers, and in August, 1880, the master was served with a writ in an action brought to recover the amount of the bills. Judgment in this action was recovered against the master in July, 1881. In October, 1881 the steamship was sold, and the master in November, 1882, instituted an action ot disbursements against her and her freight. The purchasers appeared and put in bail. At the hearing of the action the judgment recovered against the plaintiff in August, 1881, remained still in force and unsatisfied, and the plaintiff claimed to recover as a disbursement the amount for which he was liable under it:—*Held*, that the liability of the plaintiff to satisfy the judgment against him must be considered as a disbursement in respect of which a maritime lien existed under the 10th section of the Admiralty Court Act, 1861: *Held*, also, that the right to enforce such lien had not been lost by any want of reasonable diligence on the part of the plaintiff, and that his claim must be pronounced for. The Fairport [48

3. —— *Necessaries*—3 & 4 *Vict. c.* 65, *s.* 6—*Policy of Insurance—Manner of advancing Money for Necessaries.*] The insurance of a ship is not a necessary within the meaning of 3 & 4 Vict. c. 65, s. 6.—The managing owner of a foreign ship was indebted on a general account unconnected with the ship to the plaintiffs, and the freight of the ship was in the hands of certain shipbrokers, and the plaintiffs refused to make a further advance to such managing owner, but agreed to advance money for necessaries for the ship. In accordance with this arrangement the plaintiffs handed a cheque to the managing owner as though for the purchase of necessaries, and he at once returned it to the plaintiffs as payment of his debt to them, and the necessaries were actually purchased out of the freight in the hands of the shipbrokers:—*Held*, that, under the circumstances, the money must be considered as having been advanced for the purchase of necessaries, and that the manner of the advance was no bar to the plaintiffs' right to recover such an amount as was actually spent in necessaries. The Heinrich Bjorn - 151

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TOWAGE—*Breach of Contract—Condition exempting from Liability in respect of Damage arising from Negligence of Tug-owners or their Servants—Infringement of Harbour Regulations—Harbours, Docks, and Piers Clauses Act*, 1847 (10 *Vict. c.* 27), *s.* 52—*Great Yarmouth Port and Haven Act*, 1866 (29 *& 30 Vict. c. ccxlvii.*), *s.* 3.] The master of a steam tug, who had contracted to tow a fishing smack out of the harbour of Great Yarmouth to sea on the terms that his owners should not be liable for damage arising from any negligence or default of themselves or their servants, after the towage had been in part performed, took in tow in addition to the smack six other vessels, and in consequence was unable to keep the fishing smack in her course, so that she went aground and was lost. By having more than six vessels in tow at once the master of the tug disobeyed a regulation made by the harbour master of Great Yarmouth under statutory authority. The owners of the fishing smack brought an action against the owners of the steam tug to recover damages:—*Held*, that the loss of the smack was occasioned by the negligence of the master of the tug; that the defendants were protected from liability by the terms of the towage contract, and that the action must be dismissed. The United Service - - - 56

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PRINTED BY WILLIAM CLOWES AND SONS, LIMITED,
STAMFORD STREET AND CHARING CROSS.